Fleming Companies, Inc., Memphis General Merchandise Division *and* Teamsters Local Union 667, International Brotherhood of Teamsters, AFL–CIO. Cases 26–CA–17899, 26–CA–17966, 26–CA–18075, 26–CA–18101, 26–CA–18122, 26–CA–18231, 26–CA–18271, and 26–CA–18401

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

On September 18, 1998, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs. The General Counsel filed a brief in response to the Respondent's exceptions and in support of the Charging Party's exceptions. The Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

1. The Respondent excepts to the judge's finding that it violated Section 8(a)(1) by informing employees, through Leadman Mitch Zweig's statements to employee Vessie Reynolds, that it was imposing more stringent working conditions and would start enforcing rules concerning use of assigned timeclocks because of union organizing activity.[3] The Respondent asserts that Zweig was not its statutory agent or supervisor when he made the comments in question and that therefore these comments did not violate the Act.

We agree with the judge that Mitch Zweig was acting as the Respondent's agent when he made the comments in question. Under the common-law doctrine of apparent authority, "an agency relationship is established where a principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to perform the acts in question." *Mercy General Hospital*, 334 NLRB No. 13, slip op. at 2 (2001) (citing *Allegany Aggregates*, 311 NLRB 1165 (1993)). Thus, the Board considers "whether, under all [the] circumstances, the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Einhorn Enterprises*, 279 NLRB 576 (1986), enfd. 843 F.2d 1507 (2d Cir. 1988), cert. denied 488 U.S. 828 (1988) (footnote omitted).

Here, the Respondent's conduct reasonably led employees to believe that Zweig, in his role as leadperson, was acting as the Respondent's agent. The Respondent's division president, Russ Hill, told an employee that Zweig's position was not posted for bid because it is supervisory and the Respondent informed employees that Zweig, among others, was a "Team Leader." Zweig directed the employees' work. The Respondent does not contest the fact that, at the direction of higher management, Zweig gave Reynolds her disciplinary "interview" and explained it to her.[4] As a result, we find that the Respondent cloaked Zweig with at least apparent, if not actual, authority and that the employees would reasonably believe that Zweig was reflecting company policy and speaking and acting for management. See, e.g., *Delta Mechanical, Inc.*, 323 NLRB 76, 77–78 (1997) (leadman's direction of work supports agency finding); *Victor's Cafe 52*, 321 NLRB 504 fn. 1 (1996) (communication of management's views and directives indicates apparent authority); and *Great American Products*, 312 NLRB 962, 963 (1993) (leadman possessed apparent authority where introduced to employees as a supervisor

[1] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) by discharging Stanley Jones, we disavow the judge's findings and discussion in sec. D,1,b,1,c of his decision concerning a tape recording not in evidence. We also disavow the judge's statement at sec. D,1,b,1,c par. 6, that "Jones, it appears, is not satisfied with industrial due process, but only with triumph." In addition, we do not rely on Jones' surreptitious taping of a conversation with management representatives, cited in the last paragraph of sec. D,1,b,1,a of the judge's decision, as a basis for discrediting Jones' testimony.

We adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening employees with closure of the facility and threatening employee Stanley Jones with discharge for distributing union literature in the breakroom and posting it on the breakroom bulletin board. Because he inadvertently omitted the cease and desist provisions corresponding to these violations, we shall modify the judge's order accordingly and issue a new notice to employees.

The Respondent did not except to the judge's findings that it unlawfully promulgated a rule prohibiting union solicitation and unlawfully threatened employee Duc Le.

[3] Zweig, as discussed in section 3 below, also violated Sec. 8(a)(1) by removing union literature from the Respondent's bulletin boards and other property.

[4] The evidence also reflects that Zweig reported employee conduct to management.

and new employees instructed to direct work-related questions to him).[5]

2. The Respondent also excepts to the judge's finding that it violated Section 8(a)(1) by unlawfully threatening employees with plant closure if the employees selected the Union to represent them. In adopting the judge's finding, we note the following. On or about June 3, 1997, Hill stated in a speech to a large number of employees that their division had been losing money and that other Fleming divisions (union and nonunion) had closed but not any of the GMDs (general merchandise divisions, which included their division). The judge credited the testimony of two employees that Hill further stated, however, that, if the employees voted in the Union, their division "would go in the hole and the place might close down" or "could close down."[6]

In determining whether an employer's statements constitute unlawful threats or permissible predictions reasonably based on fact, the Board examines the totality of the circumstances. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (ambiguous statement may be unlawful when it is not "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control"). In the context of the speech, though noting the Respondent's financial difficulties, Hill stated no objective evidence linking the possible closing of the division to market or economic forces or any other objective basis.

We find, in agreement with the judge, that employees reasonably would understand Hill's message to be a threat to close if employees chose the Union to represent them although he couched it in terms of "might" or "could" rather than "would" close down. The Respondent effectively linked the threat of job loss with a vote for the Union. See, e.g., *Debbie Reynolds Hotel*, 332 NLRB No. 46, slip op. at 1 and 9–10 (2000) (statement that the union could be very detrimental because of employer's poor financial condition resulting in partial or complete shutdown found unlawful); and *Ludwig Motor Corp.*, 222 NLRB 635, 636 (1976) (implication that the company might move or close in event of unionization unlawful where not linked to union demands).

3. The Respondent also excepts to the judge's finding that it violated Section 8(a)(1) by removing union literature from an employee bulletin board and by threatening an employee with discipline for posting union literature on it and distributing the literature in the break room. For the reasons set forth below, we agree with the judge that the Respondent's conduct was unlawful. The facts are as follows.

The Respondent's facility has nine bulletin boards with one in each of the three breakrooms and one by each of the six timeclocks. As the judge found, employees for years have posted on the bulletin boards "a multitude" of items including wedding announcements, birthday cards, "thank you" cards, and notices selling personal property such as cars and a television. Managers have observed such notices. The Respondent posts production sheets alongside the personal items and removes personal items after they have been posted for days or weeks.

The union campaign began in January 1997[7] and the Union filed its election petition on April 16. Prior to work on March 19, employee Stanley Jones posted union literature[8] on the breakroom bulletin board and the breakroom door. Later that day, the Respondent's agent, Mitch Zweig, removed union literature from bulletin boards that had been posted earlier that day. Also, Human Resources Manager Danny Gaither, accompanied by Zweig, orally warned Jones that he could be disciplined, and possibly discharged if he continued to post union materials on the bulletin boards or warehouse walls.

The judge discredited Gaither's testimony that the Respondent maintained a rule prohibiting the posting of any personal item on the bulletin boards because they are reserved for company business. Based on the evidence, the judge further found that the Respondent maintained no restriction on the posting of personal items other than removing them after they have been posted "for all the time needed."[9]

[5] In adopting the judge's finding that Zweig's statements violate Sec. 8(a)(1), we disavow the judge's statement in sec. C,3,c,1,a par. 3 of his decision that "[n]othing in what [Human Resources Manager] Gaither said or did indicates any awareness of a union organizing campaign" on February 5, 1997, when Zweig made these statements. Gaither showed his awareness of the organizing campaign when, as the judge found, on the same date Gaither unlawfully threatened employee Duc Le for talking about the Union, stating that Le could not talk about the Union, that he knew how to take care of Le and that Le did not have a right to organize in the warehouse. In addition, we note that proof of such awareness is not required to find an unlawful threat in violation of Sec. 8(a)(1). See, e.g., *Cox Fire Protection*, 308 NLRB 793 (1992) (the test is not one of intent, but rather whether the threatened conduct has the tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 7 rights).

We further note that no exceptions were filed to the judge's failure to find Mitch Zweig a statutory supervisor.

[6] The judge did not resolve whether Hill said "might" or "could." In agreement with the judge, we find the difference immaterial in this case.

[7] All dates hereafter are in 1997 unless otherwise noted.

[8] The literature consisted of flyers entitled "35 Things Management Cannot Do" that set forth and explained Secs. 7 and 8 of the Act and listed employer conduct that violates the Act.

[9] The judge added that there is no evidence that the Respondent has ever allowed an employee to post any notice "expressing ideas and designed to induce action by employees as a group . . . including an employees' advisory committee whose purpose would be to deal with Fleming over wages, hours, or working conditions." Relying on

Board law on this point is clear. In *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983), the Board declared:

> In general, "there is no statutory right of employees or a union to use an employer's bulletin board." However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items such as social or religious affairs, sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or, in general, any nonwork-related matters, it may not "validly discriminate against notices of union meetings which employees also posted." Moreover, in cases such as these an employer's motivation, no matter how well meant, is irrelevant.

(Footnotes and citations omitted). Accord: *Roadway Express, Inc. v. NLRB*, 831 F.2d 1285, 1290 (6th Cir. 1987) (where employer, by policy or practice, "permits employee access to bulletin boards for any purpose, section 7 of the Act [ ] secures the employees' right to post union materials").

We find this case easily distinguishable from the court's opinion in *Guardian Industries Corp. v. NLRB*, supra, cited by the judge and the Respondent. There, the court found that the employer expressly and consistently limited its bulletin board use to employee "swap and shop" notices prohibiting all meeting announcements and, therefore, in the court's view, lawfully excluded all other notices, including union notices. Here, the Respondent allowed a wide range of personal postings. See *Venture Industries*, 330 NLRB No. 159, slip op. at 2 fn. 7 (2000) (distinguishing *Guardian Industries* on basis that employer permitted employee notices in numerous categories). Accord: *Be-Lo Stores*, supra, 318 NLRB at 10–12. Thus, we conclude that the Respondent violated Section 8(a)(1) by removing union literature from an employee bulletin board and by threatening an employee with discipline for posting union literature on it and distributing the literature in the breakroom.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Fleming Companies, Inc., Memphis General Merchandise Division, Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

Insert the following as paragraphs 1(e) and (f) and reletter the subsequent paragraph.

"(e) Threatening employees with closure of the facility if they select the Union as their representative.

"(f) Threatening an employee with discharge for distributing union literature in the breakroom and posting it on the breakroom bulletin board."

Dated, Washington, D.C. September 28, 2001

John C. Truesdale, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting in part.

Contrary to my colleagues, I find that the Respondent did not violate Section 8(a)(1) by removing union literature from a company bulletin board. Accordingly, I would dismiss this allegation.

As more fully set forth by the judge, the Respondent maintained a written rule specifying that company bulletin boards were to be used only for company business. In practice, however, the Respondent routinely tolerated employee postings of individual messages (such as "thank you" notes, wedding announcements, etc.) and individual notices of sale (such as cars or a television). As found by the judge, however, there is no evidence that the Respondent ever permitted employees to post notices of outside clubs or organizations. Nor does the record demonstrate that the Respondent ever countenanced employee postings of notices inducing group action by social, sports, political, or any other type of outside organization. Notwithstanding the fact that the Respondent had never permitted the posting of notices like the union literature here at issue, my colleagues find that, having permitted these other postings, it was precluded from

Guardian Industries Corp. v. NLRB, 49 F.3d 317, 321–322 (7th Cir. 1995), and *Be-Lo Stores*, 318 NLRB 1, 10–11 (1995), reversed in part, affirmed in part, and remanded on other grounds 126 F.3d 268 (4th Cir. 1997), which he implied are in conflict with *Benteler Industries*, 323 NLRB No. 712 (1997), enfd. mem. 149 F.3d 1184 (6th Cir. 1998), the judge stated that if the Board were to draw a distinction between group and individual postings, he would find the Respondent's prohibition of union material to be a lawful "morale-boosting" practice.

We do not adopt the judge's suggestion that we draw such a distinction as it would be antithetical to Sec. 7's express protection of *concerted* activity. In any event, the Respondent did not rely on a distinction between individual employee action and group action to prohibit the postings, as the judge urges; rather it relied on its witnesses' discredited testimony that it prohibited all nonwork postings. We further note that the Board's distinguishing of *Guardian Industries* in *Be-Lo Stores*, 318 NLRB at 11–12, did not constitute the Board's acquiescence in the court's analysis in *Guardian Industries*.

prohibiting the instant posting. Based largely on the rationale of the Seventh Circuit in *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995), I disagree.

In *Guardian*, the court held that the employer did not violate the Act when it prohibited employees from posting notices of union meetings on its bulletin boards. The court noted that the employer had permitted employees to post notices of individual sale (so-called "swap and shop" notices), but not the posting of general meetings of outside organizations (such as religious or charitable groups). The court therefore found that there was no basis for concluding that the employer had unlawfully discriminated against employee Section 7 rights. As stated by the court, "[a] person making a claim of discrimination must identify another case that has been treated differently and explain why that case is 'the same' in the respects the law deems relevant." Id. at 319. The court noted that such discrimination would be shown had the employer maintained a rule distinguishing between prounion organization and antiunion organization.[1] However, the court stated that it was impossible to understand how a rule equally applied to all outside organizations could constitute disparate treatment of unions. Id. at 320. I find this analysis directly applicable to the instant case.

My colleagues seek to distinguish *Guardian* on the basis that here the Respondent allowed a wide range of personal postings. Those postings, however, consisted of wedding announcements, birthday cards, "thank you" cards, and notices selling personal property such as cars and a television. Unlike the situation in *Be-Lo Stores*,[2] on which my colleagues rely, the notices that were tolerated here did not pertain to sales of products or services of outside organizations or to the distribution of political, religious or "persuader" literature. Thus, assuming arguendo that *Be-Lo Stores* was correctly decided, the instant case is distinguishable, and is in fact more similar to *Guardian*. As in *Guardian*, I find that the union literature removed by the Respondent was not comparable to the permitted postings.[3]

My colleagues also argue that, notwithstanding the fact that the removed union literature differed from the individual employee postings tolerated by the Respondent, the former must be permitted because, to do otherwise, "would be antithetical to Section 7's express protection of *concerted* activity." I disagree. There is no Section 7 right to post literature on company bulletin boards. There is only a Section 7 right to be free from discriminatory treatment. Thus, the relevant inquiry is whether the Respondent's posting policy treats, even-handedly, like postings. If, as here, it does, there is no warrant for a special exception for union literature.

I would therefore dismiss this allegation.[4]

Dated, Washington, D.C. September 28, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT prohibit by rule solicitation of any kind on company property.

WE WILL NOT threaten you with unspecified reprisals or other discipline for engaging in activities on behalf of a union.

WE WILL NOT inform you that Fleming Companies is imposing more stringent working conditions or will now enforce rules as to timeclocks, because of a union organizing campaign.

WE WILL NOT remove union literature from the bulletin boards while permitting you to post personal items there.

[1] I do not necessarily agree that this the only kind of discrimination that would be unlawful.

[2] 318 NLRB 1 (1995), reversed in part, affirmed in part, and remanded 126 F.3d 268 (4th Cir. 1997).

[3] As noted by the court in *Guardian*, supra, and *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983), and *Roadway Express, Inc. v. NLRB*, 831 F.2d 1285 (6th Cir. 1987), are likewise factually distinguishable in that both involved employers permitting the use of their bulletin boards for some organizational meetings, while excluding the union notices.

[4] Accordingly, I would also dismiss the allegation that the Respondent unlawfully warned Stanley Jones.

WE WILL NOT threaten closure of the facility if you select the Union as your representative.

WE WILL NOT threaten you with discharge for distributing union literature in the breakroom and posting it on the breakroom bulletin board.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

FLEMING COMPANIES, INC., MEMPHIS GENERAL MERCHANDISE DIVISION

Susan B. Greenberg, Esq., for the General Counsel.
Bart N. Sisk, Esq. and *J. Wilson Eaton III, Esq. (The Kullman Firm)*, of Memphis, Tennessee, for the Respondent, Fleming Companies.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a discharge case. Finding insufficient evidence as to the Government's discrimination allegations, I dismiss the main portion of the General Counsel's complaint. The events in Stanley W. Jones' discharge case prove once again the age-old wisdom, expressed some 2300 years ago by Qoheleth (the "Preacher"), and popularized in the mid-1960s by The Byrds with their recording of Pete Seeger's 1962 song, *Turn! Turn! Turn!* That lesson is: "To every thing there is a season." Later in this decision, Qoheleth gives us his specific instruction.

I presided at this 7-day trial in Memphis, Tennessee beginning January 5, 1998 and closing March 20, 1998. Trial was pursuant to the December 5, 1997 amended consolidated complaint (complaint), as amended by the December 31, 1997 third order consolidating cases and amendment to the consolidated complaint and notice of hearing. Issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 26 of the Board, the trial complaint is based on charges filed against Fleming Companies, Inc., Memphis General Merchandise Division (Fleming, FCI, or Respondent) beginning February 12, 1997 with the charge in the first case, 26–CA–17899, and ending December 4, 1997 with the charge filed in the last case, 26–CA–18401, by Teamsters Local Union 667, International Brotherhood of Teamsters, AFL–CIO (Union or Local 667).[1]

The pleadings establish that the Board has both statutory and discretionary jurisdiction over Fleming, that Fleming is a statutory employer, and that the Union is a statutory labor organization. As the pleadings establish that Fleming is a corporation, and as Fleming's answer renders its name with a closing "Inc.", as do some of the exhibits, I have modified the caption of the case to show FCI's name with a concluding "Inc."

From about January 15, 1997 to about June 3, 1997, the complaint alleges, Fleming engaged in more than a half dozen independent violations of Section 8(a)(1) of the Act, including promulgating and maintaining an unlawful no solicitation rule, threatening employees with unspecified reprisals, discipline, more stringent working conditions, and plant closure, disparately enforcing work rules, and by removing union literature from the bulletin board in the break room. Fleming denies.

The complaint also alleges that Fleming violated Section 8(a)(3) of the Act by issuing disciplinary warnings to Vessie Reynolds about February 5, August 25, and November 26, 1997, and about February 5 and August 25, 1997 to Richard Campbell, and by suspending Stanley Jones about June 25, 1997 and discharging him about September 18, 1997. Admitting the disciplinary events, Fleming denies violating the Act. At trial the General Counsel amended the Government's complaint to correct the dates of two Section 8(a)(1) allegations to February 5, 1997. (1:46).[2]

For the first of the Government's 12 witnesses, the General Counsel called Danny Gaither, the human resources manager for Fleming's Memphis facility. (1:68). When the Government conditionally rested (subject to matters pertaining to some tapes) (5:820–821), and after I had denied Fleming's motion (5:821) to dismiss complaint paragraphs 14 and 15 (the February 5 warnings to Vessie Reynolds and Richard Campbell, respectively) (5:826), Fleming proceeded to call its seven witnesses. In addition to five leadpersons, supervisors, and managers, Fleming called Peggy S. Cates (5:828), the secretary to the Distribution Manager Mark Aldridge, and Deborah Grandberry (7:1168), a checker at the Memphis facility. At the rebuttal stage the General Counsel recalled alleged discriminatee Stanley W. Jones. (7:1337). There was no surrebuttal.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and by Fleming [neither party attached a proposed order and notice; private parties are well advised to offer suggestions at the formative stage rather than later trying to modify that which does not suit their pleasure], I make these

FINDINGS OF FACT

A. Fleming's Memphis Operations

A wholesale grocery distribution company (1:70, Gaither) headquartered in Oklahoma City, Oklahoma (1:81, Gaither; 7:1330, Aldridge), Fleming operates a 590,000 square foot two-building warehouse in Memphis (1:73), the facility involved in this proceeding. During most of 1997, the relevant time period, Russ Hill was the division president in charge of the Memphis facility, and Human Resources Manager Gaither reported to Hill. (1:72; GCX 2 at 2). On December 27, 1997 Hill left Fleming, and a restructuring occurred in which Gaither and certain others at Memphis began reporting to Aldridge, with Aldridge reporting to Wiley Raper, the Vice President of Operations, whose office is in Oklahoma City. (1:71; 7:1330). [Currently, Tom Ficht is the Director of Sales and General Manager at Memphis, and he also reports to a superior at Oklahoma City. (1:72).]

[1] All dates are for 1997 unless otherwise indicated.

[2] References to the seven-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's and RX for those of Respondent Fleming.

During 1997, Warehouse Supervisor (5:852) Doug Sanders reported to (1:75; GCX 2 at 3) Distribution Manager Mark Aldridge, and (6:1012) still does. Mark Henry has been one of two warehouse comanagers, with Dennis Strait being the other. (1:74; GCX 2 at 2). They reported to Aldridge during 1997. (1:74-75). Since about January 1997 Robert B. "Bobby" Marston has been the leadperson in the Receiving Department reporting to Dennis Strait. (6:1055, 1070; GCX 2 at 3). Finally, Michael A. "Mitch" Zweig is the leadperson for the stockers. (7:1223). He reported to both Henry and Strait, the warehouse comanagers (GCX 2 at 3).

The complaint alleges that Zweig has been a statutory supervisor during the relevant time. Fleming denies. Three 8(a)(1) counts (complaint paragraphs 9, 10, and 12) allege conduct attributed to Zweig. As Zweig is merely an alleged perpetrator, and not alleged by the General Counsel as a discriminatee (with Fleming claiming a right to discipline a statutory supervisor), I need not resolve supervisory status, for it is sufficient if the evidence shows that Zweig was Fleming's statutory agent at the time of the alleged unlawful conduct. *NLRB v. Thermon Heat Tracing Services*, 143 F.3d 181, 188 (5th Cir. 1998); *Industrial Construction Services*, 323 NLRB 1037 (1997); *Delta Mechanical*, 323 NLRB 76, 78 and fn. 7 (1997).

The complaint does not allege that Leadperson Marston was a statutory supervisor or statutory agent during the relevant time. However, the parties stipulated that under company policy, nonsupervisory employees were required to show some deference to leadpersons. (6:1098–1100).

B. Overview of the Union's Organizing Campaign

About January 1997 the Union began an organizing drive at Fleming's Memphis facility. (3:505, 512). The parties stipulated that the Union filed its election petition on April 16 (in Case 26–RC–7907 concerning what, for simplicity, I refer to as a general warehouse unit), and that an election was held on June 4, 1997. Of 139 eligible voters, 65 voted Yes, 63 No, and 9 ballots were challenged. The Union and Fleming filed objections. The Regional Director for NLRB Region 26 directed a hearing on the challenges and objections. Thereafter, a 4-day hearing was held in October, and the Hearing Officer's Report issued on December 5, 1997. As of the trial before me, the time had not expired for filing exceptions to the report. I received the stipulation. (2:182–184). As the parties have not notified me otherwise, I assume that the representation case remains pending before the Board. The parties also stipulated that alleged discriminatee Stanley Jones was one of two observers for the Union at the election of June 4, 1997, and that his name appears on two (GCXs 14, 15) of the election documents. (1:64; 2:181–182).

C. Alleged Acts of Coercion

1. No solicitation rule

About January 15, 1997 Fleming issued its revised employee handbook, "Product Supply Center Work Procedures." (GCX 3). Rule XVIII of the handbook provides (GCX 3 at internal 5):

> Solicitation of any kind is prohibited on company property. Associates [Fleming's term for employees, 2:139] or others may not solicit or canvass for outside organizations, collect donations, or solicit money. This includes, but is not limited to, the sale of chances, raffle tickets, Avon, Tupperware, chain letters, lodges, etc.

The complaint alleges that Fleming violated Section 8(a)(1) by promulgating and maintaining the rule. Fleming defends on the basis that employees were not inhibited in soliciting for the Union during the campaign, nor were they disciplined for doing so. Fleming overlooks the February 5, 1997 instruction which Human Resources Manager Gaither gave employee Duc Le, discussed in the next section. In any event, Fleming misperceives its burden which was to demonstrate that the presumptively unlawful rule was "communicated or applied in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work." *MTD Products*, 310 NLRB 733 (1993). As in *MTD*, Fleming did not "adduce any evidence that it told employees that solicitation during nonworking time was permitted. Nor did Respondent show that it knowingly tolerated solicitation during nonworking time." Id. I find the rule's promulgation and maintenance to violate Section 8(a)(1) of the Act, as alleged. Fleming must be ordered to rescind the rule, to the extent it has not already done so.

The General Counsel (Brief at 5) cites and quotes from "G.G. Exh.-R 65." From the code supplied by the General Counsel for such references, the "R" means Rejected, for GCX 65 is a rejected exhibit (7:1332, 1344). GCX 65-Rejected is a one-page notice (dated January 14, 1998) to employees concerning a revision, or "clarification," of certain rules, including the no solicitation rule. In the absence of a motion requesting that I reconsider my ruling rejecting the offer of GCX 65, the General Counsel improperly cites and quotes from the rejected exhibit.

2. February 5, 1997—Duc Le

a. Facts

Complaint paragraph 8 alleges that about February 5, 1997 Human Resources Manager Gaither "threatened an employee with unspecified reprisals for engaging in activity on behalf of the Union and engaging in concerted activity." Fleming denies.

Duc Le worked for Fleming some 10 years. He was a stocker in the Housewares Department when the Union's organizing campaign began in January 1997. (3:511–512). On February 5 employee Tri Dang approached Le and asked Le the amount of union dues per week. As Le was talking to another employee, he waved Dang off without looking at Dang. Apparently insulted and angered by this perceived slight, Dang loudly told Le that not to ever speak to him about the Union, and if he ever did, then Dang would go straight to the office and report it. (2:513, 515–516, 527–529).

No more than 10 minutes later (3:516), as Le was standing on the platform of his "picker" (a lift machine) at floor level, Human Resources Manager Gaither suddenly appeared about a foot from Le's face and, pointing his right index finger at Le's face, told Le: "Don't talk about the Union shit. I know how to

take care of you." Gaither then took a step back, and Le said that he had not talked about the Union. Gaither responded, "You have a right to organize, but not in the warehouse." Gaither then left. (3:514, 518, 525).

Gaither admits (1:90) that, apparently based on a report that Le was "following Dang concerning the Union," he told Le something similar to "keep that Union shit out of here." Gaither does not further address the matter when he later was called during Fleming's case in defense.

A week later, concerned over Gaither's actions and comments, and fearful that Gaither could find a pretext to fire him, Le went to see Gaither in the latter's office. Saying that Gaither had hurt him by his remarks, and his statement that he knew how to "take care of" Le, Le asked Gaither what he had meant. Gaither said that, although Le had a right to organize, he was not to do it in the work place. Gaither disclosed that Jim Falin had reported Le's conduct. Gaither told Le that he should not harass the people. Le replied that he was not foolish enough to do that. If so, and if that did not happen, Gaither replied, then "I apologize." (3:520–521). Le did not begin wearing any Union insignia until about 2 weeks after his second conversation (February 12) with Gaither. (3:526).

Respecting potential bias by Le against Fleming, record evidence shows that Fleming terminated Le on July 22, 1997. (3:530). As early as 1994 Le filed charges with the EEOC against Fleming, and these were amended to encompass his discharge. Currently his EEOC charges are pending before a court. (3:530–532). Le also filed NLRB charges concerning his discharge (and preliminary discipline) by Fleming. The parties stipulated that those charges were dismissed by NLRB Region 26 in September 1997. (7:1145–1147).

b. Discussion

Notwithstanding the charges and other litigation which Le has filed, past and present, against Fleming, and weighing those matters in the balance, I observe that Le testified with a favorable demeanor, and I credit him. I also find that Gaither was acting on a report, however distorted, that Le had been talking in the warehouse to another employee "concerning the Union." Without the benefit of any investigation, such as asking for Le's version, Gaither accosted Le and threatened him. When Le protested his innocence of talking union, Gaither recited, in effect, the unlawful Rule XVIII.

Citing Gaither's apology and lack of any discipline against Le over the matter, Fleming's defense is that "nothing happened." (Brief at 62). But something did happen. As alleged in complaint paragraph 8, Gaither (apparently relying on Fleming's unlawful Rule XVIII) threatened Le with "unspecified reprisals" based on suspected Union activities by Le inside the warehouse. The violation of Section 8(a)(1), as alleged, is established.

[In light of the very strong evidence on this allegation, and the absence of any contradictory evidence, Fleming's position would have been far more commendable had it just conceded. Such a commendable action serves to enhance the general credibility of a party's overall position—and that is not something to be squandered.]

3. February 5, 1997—Richard Campbell and Vessie Reynolds

a. Introduction

Before his August 1996 assignment as distribution manager at Memphis, Mark Aldridge was the warehouse manager in Kansas City [Kansas or Missouri not specified]. (7:1306). After arriving in Memphis (and having even earlier reviewed the facility's work rules), Aldridge "stood back and observed how things were being applied and whether or not they were being followed." "Q. What did you see?" "A. They weren't being followed." Asked what he did, Aldridge describes how, after determining that enforcement was lax, he began holding meetings with managers and supervisors in an effort, apparently, to tighten up the enforcement of the work rules. He found that the employees ("Associates") had to be reminded of the rules, and on occasion still have to be reminded. (7:1320–1321, 1331).

All this bears on the allegations to be considered here. Two 8(a)(1) allegations (complaint paragraphs 9 and 10) focus on alleged supervisor Mitch Zweig concerning events on February 5. As two 8(a)(3) allegations (complaint paragraphs 14 and 15) arise from the same incident, I address the four paragraphs here.

Paragraph 9 alleges that, about February 5, 1997, Zweig, "by informing an employee that the Employer would be watching employee break times, informed an employee that the Employer was imposing more stringent work conditions because of the union campaign." Fleming denies. Also on the same date, complaint paragraph 10 alleges, Zweig, "by informing employees that they must clock in at their assigned time clocks, disparately enforced work rules in response to the union campaign." Fleming denies.

Disciplinary warnings issued to Vessie Reynolds and Richard Campbell on February 5 are attacked by complaint paragraphs 14 and 15, respectively. Fleming admits the fact but denies any violation.

As noted earlier, although the complaint alleges that Michael A. "Mitch" Zweig is a statutory supervisor and statutory agent, in this case I need determine merely whether he was a statutory agent during the relevant time. My finding is that he was. Initially Fleming announced that Zweig's title, on his mid-January promotion from forklift operator (7:1223), was "supervisor." When order selector Verna L. Brown asked Division President Hill why the position had not been posted for bid, Hill told Brown that it was because the position was supervisory. (3:407–408). Distribution Manager Aldridge reaffirmed the title as supervisor. (3:408–409). Later that spring, before the June election, it is undisputed that Fleming announced to employees that Zweig and others were "Team Leaders." The record reflects that Zweig, after his mid-January promotion, directed employees in their work. They looked on him as their immediate supervisor. Aldridge testified that, although leadpersons have no authority to discipline employees, they can report matters to the supervisor for action and can submit to supervision written reports of their observations. (7:1311). Finding that the employees would reasonably view Mitch Zweig as speaking to them on behalf of management, I further find that, during the relevant time, Zweig was a statutory agent

of Fleming. I use the title of "leadperson" for Zweig because that is his official work title. (7:1223, 1307–1309).

b. Facts

On February 5 stocker Vessie Reynolds clocked in 15 minutes before her 6 a.m. starting time. Stocker Richard Campbell clocked in at 5:50 a.m., 10 minutes early. Both went to the breakroom where, at 6:15 a.m., they were observed seated at a table by Leadperson Zweig and Human Resources Manager Gaither. Gaither testified that Fleming maintains a rule allowing employees to punch in no earlier than 5 minutes before their scheduled shift. (7:1192). "Interviews," normally the least form or first step of Fleming's disciplinary system (6:1024; 7:1188; GCX 3 at internal 7-8), were issued to Reynolds (GCX 5) and to Campbell (GCX 6) for "stealing time." Gaither determined the level of discipline to issue. (7:1194). There is no evidence that, on this occasion, either Reynolds or Campbell was wearing any union insignia. Gaither had never seen Reynolds wearing any union insignia before then (7:1192), nor had Zweig (7:1228). Zweig also testified that that on February 5 he did not know that Reynolds was supporting the Union, nor did he, at any time on or before February 5, tell Gaither that Reynolds was supporting the Union. (7:1225). Reynolds concedes that she did not begin wearing union insignia until about March. (3:501–506). Campbell rather tentatively states that he began wearing union insignia about late January to early February. As all the employees who wore the insignia came out with them the same day, apparently in March (3:506), I find that Campbell's recollection of the time is about a month or so early.

Evidence respecting Fleming's past practice is mixed, with warnings having issued for such things as clocking in early and not in assigned area (RX 25; 5–14–93); punching in earlier than the allowed 5 minutes before starting time (RX 10; 4–20-95); and failing to clock out for 45 minutes, suggesting possible "stealing paid time" (RX 30; 7–11–95). On the other hand, there is testimony that such rules, at least before January 1997, were only sporadically enforced. Aside from Fleming's argument that "past practice" really must be deemed as beginning with the new, tighter enforcement policy of Distribution Manager Aldridge, Fleming argues that the decisive factors are these:(1) no showing of knowledge of union activities by Reynolds or Campbell, and (2) no showing of disparity (that is, no showing that management ever condoned an employee's clocking in early and then sitting in the breakroom for 15 minutes into his or her shift). Indeed, while Government witnesses do testify that management has observed them taking their lunch to the refrigerator in the breakroom after they clocked in and into their shift, none describes taking a seat in the breakroom, and especially being so seated 15 minutes into the shift.

To show a violation, the General Counsel relies on a conversation held that February 5 between Reynolds and Zweig when Zweig gave Reynolds her "interview" warning. Reynolds secretly tape recorded the conversation. That portion of the tape (GCX 54) is in evidence, as are transcripts (GCX 61, Government's version; and RX 40, Fleming's version). Although most of the differences in the transcripts are minor, at two points the Government's version adds words when voice overspeaking on the tape actually renders that portion of the conversation unintelligible. These two points are the fourth entry for Zweig, with the addition of "Yeah, because." The other is the fifth from last entry for Zweig, "That's what Richard." (GCX 61 at 2). Accordingly, I rely only on RX 40 as the more accurate version.

As the transcript reflects, Zweig begins by apologizing for calling Reynolds in to issue her the warning. He explains that the decision was not his, but Gaither's. [At trial Zweig confirms this (7:1304), although Gaither asserts (7:1194) that Zweig agreed with Gaither that some form of discipline should issue.] After expressing her understanding that the employees could go put their lunch in the refrigerator, Reynolds states that she would not sign the form because "that's just Danny [mostly] upset more than anything about the union stuff." (RX 40).

Zweig does not ask, "What union stuff?" Instead, he proceeds to state that Gaither "went through that this morning and he had to bust up that thing down there in the lift room ... All I can tell you is he's on the warpath." At trial Zweig testified that, as to the lift room matter [apparently the Duc Le, Tri Dang, and Gaither events described earlier], he had "heard there was a gathering of a few people in there." (7:1296). Zweig also explains that, on that February 5 date, he had been a leadperson for less than 3 weeks, this was his first time to issue a disciplinary interview, he was trying to relate to Reynolds' situation, and reference to a "warpath" was his own statement. (7:1304–1305). Gaither denies that he was on any "warpath." (7:1195).

The next three exchanges, mostly about signing or not signing, also include another reference by Reynolds to the union by her assertion that she knows that "they are just upset over the union thing, but I can't sign it." Again, Zweig does not respond to her reference to a "union thing" or to management's (obviously the "they" in her statement) being "upset."

"In the future," Zweig continues [adding that "this is me telling you this,"], and this apparently is where the complaint allegation focuses, "they [management, 7:1297] got Dennis [Strait, 7:1297] down there [front office, 7:1297] printing up a letter about punching in on the right clock so nobody can get in early ... and they're going to be looking at breaks and (inaudible) and stuff like that." The letter Zweig refers to apparently is the February 6, 1997 memo (GCX 7) from Strait to all employees concerning "Employee Clocks." Strait there reminds employees that they are to punch in on their "home" clocks, and not to expand their breaks. "No more will there be going early and staying late. (Follow the horns.)" The memo then tells employees they should not be taking a lot of time between punching in and logging on to "Real-Time," but should be "logged on shortly after you arrive to work." Then, "All of the above will be monitored and I expect to see a great improvement." The complaint does not attack Strait's memo of February 6. Gaither testified that Strait's memo sets forth nothing new, but is a reminder or "clarification" for employees because of the confusion on the part of the two employees [Reynolds and Campbell, obviously]. (1:101–102).

There follows some small talk in which Reynolds once again refers to "union," this time referring to a union meeting (RX 40 at 2):"And like we told them yesterday in the union meeting

[there is no evidence that management had begun its employee meetings at this early date, so this apparently is a reference to a meeting of some employees with a Union representative], they don't know what we're talking about. We have to discuss things, what's going on with our jobs." In his response to this, Zweig makes no reference to a union or union meeting.

After an abbreviated comment by Reynolds, Zweig makes a controversial statement (RX 40 at 2):"Like I said," [nothing shows he previously has said what follows], "this union stuff has them stirred." Zweig testified that "union stuff" means talk of a union, that "them" is management, that no one told him management was "stirred," and that no one in management appeared to him to have been "stirred" by any "union stuff," that the phrase was simply his own personal expression, and that it was not based on any observation, but on his personal feeling. (7:1298–1299, 1305).

Among the few remaining exchanges (mostly statements by Zweig that he tries to treat people properly and have a good relationship, and with Reynolds' telling him that he is doing a good job), Zweig cautions Reynolds, "Be careful. That's my personal word to you." (RX 40 at 2).

c. Discussion

(1) The 8(a)(1) allegations

(a) Watching breaktimes

Complaint paragraph 9 attacks Zweig's statement that Fleming would be "looking at breaks." Indeed, the very next day Warehouse Manager Strait issued a memo (not attacked by the complaint and not litigated as an unfair labor practice) reminding employees to adhere to their break times. Recall that former Division President Russ Hill left at the end of December 1996, and Distribution Manager Mark Aldridge assumed command of, apparently, everything concerning the warehouse and distribution system. Beginning January 1997, Aldridge was free to impose his own tighter-operating system on the warehouse. That the Union's organizing campaign began about this same time does not mean that some freeze order was imposed by law on Fleming's ability to manage its business. Fleming remained free to remind employees to adhere to the rules, as it has done in the past [indeed, it has issued written warnings in the past], even though it may be aware of a union organizing campaign.

The problem is that Aldridge did not issue some memo in early January advising employees that henceforth the rules must be followed, and that after clocking in they were to go straight to their work stations. He did not say that they no longer could take their lunches to the refrigerator in the breakroom before going to work. Yet many employees had been doing the latter for years with nothing said, even though their trip to the breakroom caused them to be there after the starting time of their shift. For example, as Richard Campbell credibly testified, during 1996 Human Resources Manager Gaither saw him on such occasions after the start of his shift in the breakroom four or five times during 1996, yet Gaither never said anything to him that he should not be there after his shift started. (4:557).

As of February 5, Gaither expressly was concerned that Duc Le was violating Fleming's (unlawful) rule about not soliciting for a union on the premises. Nothing in what Gaither said or did indicates any awareness of a union organizing campaign. The only asserted inference of Fleming's knowledge of that, as of February 5, comes from the February 5 transcript of leadperson Zweig's remarks. Distribution Manager Aldridge testified that management's first indication of visible union activity was when some employees began wearing union insignia about mid to late February 1997. (7:1314). Although Gaither "thinks" the Union's organizing began in "early February" (1:90), that could be a description of a later assessment rather than a statement of when he first learned (a question neither he nor Aldridge was asked).

That takes us back to the transcript of Leadperson Zweig's remarks. Resolution of this 8(a)(1) allegation turns on what Zweig said. What he said on this point was that Human Resources Manager Gaither was on the "warpath" following the "thing down there in the lift room" and that management was "going to be looking at breaks." Those remarks could be ambiguous (because Zweig does not explain what he is referring to) except that Zweig does not deny Reynolds' statement that Gaither is mostly upset about the "union stuff." Although Zweig does not initially respond to Reynolds' references to a "union" and "union thing," that could be consistent with a possible fear by Zweig that anything he said about a union would be improper and therefore the better course would be to say nothing—except that is not the course Zweig follows.

Eventually Zweig does refer to "union" when he states that the "union stuff" has management ("them") "stirred." And that statement is followed by an interrupted expression of opinion that "There should be a notice out on the board about the . . . ." In short, Zweig, as I find, was expressing the opinion that management should have alerted the employees that strict enforcement would be imposed before management began issuing warnings. Note the intertwining references to "union" or "union stuff" by both Reynolds and Zweig, and Zweig's statement that Warehouse Manager Strait was even then drafting a memo about these matters, and that management "would be looking at breaks." Add to that Zweig's expression of opinion that management should have posted a warning memo before it began issuing warnings over stricter enforcement of the rules, coupled with the text of the warnings themselves requiring employees to go directly to their work stations after they punch in, the conclusion is compelled that the overall statement was coercive. I therefore find, on this February 5, 1997, Leadperson Mitch Zweig told employee Vessie Reynolds that Fleming (complaint paragraph 9) "was imposing more stringent working conditions because of the union campaign." I therefore find that, by such coercive statement, Fleming violated Section 8(a)(1) of the Act, as alleged.

(b) Use assigned timeclocks

For support of this allegation (complaint paragraph 10), the Government apparently relies on Zweig's transcript reference that management had Dennis Strait "down there printing up a letter about punching in on the right clock so nobody can get in early . . ." (RX 40 at 1–2), as well as statements in the warnings

(GCXs 5, 6). Under the topic of "What Does The Company Expect," the warnings read (the wording is slightly different in the warnings, but Gaither apparently intended that the text read the same, which I find as follows):

> Associates to go to work immediately after punching in. We have scheduled breaks. Associates have no need to be in breakroom at any other time. The Company also expects Associates to punch in & out on their assigned time clocks. [Here the text gives the assigned clock number and area for Reynolds and for Campbell on their respective warnings.] No Associate should punch in before 5 minutes before the scheduled shift without the prior approval of a supervisor.

The text for "Under Future Action" reads, as to Reynolds' warning (GCX 5):

> Written warning is the normal second step. This act could be construed as stealing time which could result in discharge without further warning.

Campbell's states essentially the same, but is a bit more abbreviated. (GCX 6).

As Human Resources Manager Gaither explains, the time clocks[3] are geared to, and located near, work areas. The clocks are programmed with employees' work schedules for that area. If an employee attempts to clock in earlier than 5 minutes before his scheduled time, the time clock will not register the time. However, time clocks located elsewhere will accept the magnetic card. Employees have been told to use the time clocks in or near their work areas. (1:98–99; 7:1192, Gaither). The employee handbook (GCX 3, revised, January 15, 1997), in describing the rules for use of time clocks (Rule IX), says nothing about assigned clocks. Nevertheless, Richard Campbell confirms that employees have assigned clocks based on work areas. (4:554, 564, 614). Acknowledging that employees are not to clock in earlier than 5 minutes before the start of their shift (3:456), Reynolds asserts (3:457) that employees "had just been punching in anywhere."

Richard Campbell, a 20-year employee (4:551), testified that if he was arriving late he would clock in at the first time clock he came to in order not to be tardy. (4:554, 565, 612–613). From time to time, Campbell suggests (4:565), management would "enforce" its assigned-clock policy. Stocker Charles S. Anthony, on the other hand, who likewise did this for most of 1997, has not been told to stop doing it. (4:639).

Complaint paragraph 10 apparently attacks Zweig's transcript statement about Strait's "printing up a letter about punching in on the right clock" plus the text on the warning that employees are to use their assigned clocks. As with the discussion about complaint paragraph 9, the same analysis applies here. With all the references in the conversation between Zweig and Vessie Reynolds, especially the reference that management was "stirred" about the "Union stuff," a reasonable interpretation an employee would draw is that management was imposing this particular enforcement (unlike previous enforcements) of the assigned-clock rule because of the union organizing campaign. I so find. As such a message is unlawfully coercive, I find that by such coercive message Fleming violated Section 8(a)(1) of the Act, as alleged.

(2) The related 8(a)(3) allegations

Respecting the issue of knowledge, the parties focus their arguments, on brief, concerning whether Fleming had knowledge of any union activities as of February 5, 1997 as to Vessie Reynolds and Richard Campbell. The evidence fails to show knowledge either by Leadperson Zweig or by Human Resources Manager Gaither concerning union activities by either Reynolds or Campbell. Ordinarily this would be fatal to the 8(a)(3) allegations concerning the February 5 warnings to Reynolds (complaint paragraph 14) and Campbell (complaint paragraph 15). However, the Government's theory, as expressed at trial, appears to extend to a union-based tightening of the rules for everyone, with Reynolds and Campbell simply being the first to suffer discipline because of the union-based stricter enforcement. (5:825–826). Although Fleming disagrees that such would be a violation (5:825–826), it is well established that an unlawfully motivated decision to discriminate against a group renders each individual application of the decision unlawful regardless of a showing of protected activity by each member of the group. See *NLRB v. Thermon Heat Tracing Services*, 143 F.3d 181, 188 (5th Cir. 1998); *NLRB v. McClain of Georgia*, 138 F.3d 1418, 1423–1424 (11th Cir. 1998); *Treanor Moving & Storage Co.*, 311 NLRB 371 at 371 (1993).

It is clear, and I find, that the timing for the February 5 warnings to Vessie Reynolds and Richard Campbell was the awareness which Fleming's management had obtained (as reflected by the transcript, RX 40, of Leadperson Zweig's February 5 conversation with Vessie Reynolds) of the union organizing. As Zweig put it, management was "stirred" over this "union stuff," and so much so that it had warehouse manager Dennis Strait printing a memo telling employees to punch in on their assigned clocks, addressing breaks, and "stuff like that," And that is exactly what Strait's memo (GCX 7), which issued the very next day, covered. As to breaks, Strait told employees, in part, "No more will there be going early and staying late. (Follow the horns.)"

Now if it was not the union organizing that triggered Strait's memo, what incident did? Gaither says it was the February 5 conduct of Vessie Reynolds and of Richard Campbell. (1:101–102). From the transcript (RX 40) of Leadperson Zweig's remarks to Vessie Reynolds, however, we learn that it was the former, not the latter. On February 5 Zweig told Reynolds that it was all that "union stuff." Clearly, all the "going early and staying late" on breaks had been tolerated, generally (there have been a few warnings in sporadic enforcement in previous years), until management learned of the union organizing. And union organizing, I find, is something that management at Fleming would not tolerate.

Earlier I found that Leadperson Michael A. "Mitch" Zweig, during the relevant time, was Fleming's statutory agent. That means Fleming is responsible for the comments which Zweig made to Vessie Reynolds on February 5. As Zweig's February 5 remarks reflect, Fleming's motivation for imposing stricter

[3] The timeclocks are not "punched." The system uses magnetic cards, similar in appearance to a credit card, which each employee swipes through an electronic reader. (1:97–98; 7:1310).

enforcement of its rules was union based. That is, it was to warn employees, in a vivid way, of the seriously adverse consequences which would be visited on employees if they did not forget about supporting any union organizing effort. Accordingly, I find that the Government demonstrated, by a preponderance of the evidence, that a motivating reason for the February 5, 1997 warnings to Vessie Reynolds and Richard Campbell was Fleming's desire to stop the union organizing before it advanced any further.

Because the Government established, prima facie, that the warnings violated Section 8(a)(3) of the Act, the burden then shifted to Fleming to demonstrate by a preponderance of the evidence (as an affirmative defense) that it would have issued the warnings even had there been no union considerations. Did Fleming do so? I find that it did.

Although the evidence shows that many employees would clock in and first go to the breakroom, where they would put their lunches in the refrigerator, or to get a drink of cold water, and that this process would find them not leaving the breakroom for the first very few minutes after the start of their shift, no description is given (not even by Vessie Reynolds or Richard Campbell) that they, or any of them, ever sat at tables in the breakroom and talked for 15 minutes into their shift. Yet Reynolds and Richard Campbell were seated at a table in the breakroom at 6:15 a.m.—15 minutes after their shift had started. In view of the unprecedented duration of this delay in the breakroom by Vessie Reynolds and Richard Campbell, their 15-minute absence from their work stations falls more into the category of other past warnings issued for similar absences, from the work area, to one Kenneth Harris in February 1994 (RX 26) and October 1994 (RX 27).

For these reasons I shall dismiss complaint paragraphs 14 and 15 regarding the February 5, 1997 warnings issued to Vessie Reynolds and to Richard Campbell.

4. March 19, 1997—bulletin board postings

a. Introduction

The next two allegations involve postings on the bulletin boards on March 19, 1997. The first, complaint paragraph 11, pertains to postings by Stanley W. Jones. The allegation is that, on this occasion (the allegation actually uses a different date) Fleming, by Human Resources Manager Gaither, "threatened an employee with discipline, including discharge, for distributing union literature in the breakroom and posting union literature on a bulletin board." Fleming denies.

Complaint paragraph 12 alleges that, for the same time period, leadperson Mitch Zweig "removed union literature from the bulletin board in the break room." Fleming denies.

Among the rules in its employee handbook, Rule XII covers "Bulletin board Policy." The rule's single provision reads: "The use of company bulletin boards are [is] for company business purposes only." (GCX 3 at internal 4; 7:1212, Gaither).

Human Resources Manager Gaither reports (1:93–94) that the facility has 9 bulletin boards—one in each of 3 breakrooms, and 1 by each of the facility's 6 time clocks. The boards are similar to corkboard, they are covered by clear plastic with plastic pockets, and they are unlocked. (3:327–330, Bland). [Order selector Annie P. Harris asserts that at least one bulletin board is covered by glass. (3:388).] Gaither asserts that, under Fleming's bulletin board rule, employees are not permitted to post personal items on any of the bulletin boards because they are reserved for company business. Occasionally an employee asks about posting a notice of a charity event at a local church, and Gaither informs the employee that such posting is not permitted because the bulletin boards are reserved for company business. Gaither has never granted approval for an employee to post a personal notice on a bulletin board. About once a week, on average, Gaither walks through the facility checking the bulletin boards. He sometimes finds a "thank you card or something and, of course, I have to regretfully take it down." When Gaither knows who posted the (signed, apparently) item, he removes the item and about "45 percent" of the time he assertedly advises the employee of the company's policy. He does not undertake to impose any discipline when an identified employee has posted a personal item. (1:94–95; 7:1189).

The Government's employee witnesses give a description which differs on a couple of points. They describe a multitude of postings of personal items such as wedding announcements, birthday cards, thank you cards after, for example, a death[4] (4:652–653, Anthony), and similar personal items. The witnesses describe how, for many years, some of these items may remain posted for days or even weeks. Annette Bland advises (2:263) that supervisors and managers walk past the bulletin boards. (2:263). Supervisor Rose Gholston posts production sheets beside the personal postings. (3:394). Supervisor Gholston is named as one who removes such personal items, but that is after they have been there awhile. (3:393). However, when a thank you note was posted by Stanley Jones, Supervisor Gholston removed it the same morning. (3:387, 390, 395). When Jones reposted it, Gholston again removed it and gave it to Annie P. Harris to give to Jones. Gholston told Harris to tell Jones that such items could not be posted. (3:395–396, Harris). Because Jones had a rather prominent status, and problems, at Fleming, I find that Gholston's removal of the Jones posting was an exception to her usual delayed response. Thus, I find that Supervisor Gholston (who did not testify) consistently and knowingly allowed personal items to remain posted for days before she removed them.

I also find that Human Resources Manager Gaither's description of his trips through the plant checking the bulletin boards, and occasionally advising employees of Fleming's bulletin board policy, is mostly self serving and unreliable. That is, while most testimony, by nature, serves the interest of a witness, I mean here that Gaither's delivery of his testimony was unpersuasive and his demeanor unfavorable on this point. As to this, I generally do not believe him. This is not to say that he has never done this. But, I find, his doing so is a seldom event. Thus, I credit the version of the employees that, in practice, there is no restriction on the posting of personal items other than, after a notice has been posted for all the time needed, a supervisor will remove the notice if the employee who posted it has not done so.

[4] Forklift driver Annette Johnson Bland explains that employees frequently collect money for an employee who has suffered the loss a family member. (2:262; 3:328, 332, 340).

In addition to posting many notices of weddings, births, and similar personal matters, employees sometimes post notices of items they wish to sell, such as motor vehicles (2:186–187, Jones; 2:262; 3:340–341, Bland) or (4:654, Anthony) a big-screen television. With one exception, all such items described by the witnesses are have been the personal property of the employees. There is no evidence that any employee was engaged in selling personal property for profit as part of a part time business. Thus, there is no evidence that employees post notices that they sell Avon, Tupperware, or any other commercial product.

The one exception to this evidence of employee-only items is given by Order Selector Verna J. Brown. According to Brown, sometime about the spring of 1997, but before she became aware of union activity (she gives no approximate date when she became aware), she overheard employee Lula Robertson ask Distribution Manager Mark Aldridge if she could post, on a bulletin board, an advertisement for pictures made, for a price, at her church. Aldridge said she could, and she did. Brown cannot recall how long the church advertisement remained posted (3:401–403). Robertson did not testify. No other employee corroborates this matter by, for example, testifying that he or she saw the posted advertisement of the church or that he or she responded to the advertisement and had a picture made.

Acknowledging that Robertson, about May 1997, did request permission to post a church announcement about a photographer's taking family portraits, Aldridge explains that he told Robertson that such information could not be posted on the bulletin boards. However, Aldridge told Robertson, he personally might be interested, and he suggested that she bring the information to his office. She did so. (7:1318, 1319), On this point I credit Aldridge who testified with more conviction and detail that did Brown. I also note the lack of corroboration by any witness (including the absent Lulu Robertson) that any such church announcement was actually posted.

Moreover, the fact that the asserted exception is just that—a single claimed exception out of a universe of commercial, charitable, civic, religious, and political groups always eager to gain access to company bulletin boards. This fact detracts from the plausibility of one such event. That is, the rational likelihood is that if one commercial posting had been allowed, others would have followed. The absence of evidence that any others did follow strongly suggests that there never was a first time. Also as to plausibility, I find it unlikely that Aldridge, who credibly testified that he read the facility's work rules before he arrived there, would have granted an on-the-spot exception to Fleming's bulletin board policy when he would had to have recognized that such an exception for one commercial venture would open the flood gates as to all. Finding that Brown was mistaken in what she heard, and remembered, and crediting Aldridge, I find that, so far as the record shows, Fleming has never knowingly permitted (even by "seeing no evil") any employee to post notices of an outside organization (commercial or otherwise) on any of Fleming's bulletin boards.

Finally, there is no evidence that Fleming has ever allowed an employee to post any notice expressing ideas and designed to induce action by employees as a group, such as an investment club, travel club, sports club, religious club, political club, or any similar club or committee—including an employees' advisory committee whose purpose would be to deal with Fleming over wages, hours, or working conditions.

b. Mitch Zweig

(1) Facts

Forklift driver Annette Johnson Bland testified that, on March 19, 1997, when she was a stocker working for Mitch Zweig (2:258–259), she observed Zweig removing union literature that someone had posted on a breakroom door and on a computer cabinet. It was a Wednesday morning. Bland had clocked in about 10 minutes earlier, at 6 a.m. Zweig had the papers rolled up in his hand. The flyers also were posted "on the bulletin boards when you first walk in and I saw him taking them down and he had them rolled up in his hand like this."[5] (2:258–260; 3:330–331). Zweig did not address this testimony when he took the stand.

Although some of Bland's testimony tends to raise a question as to whether she observed Zweig actually removing the flyers from one or more of the bulletin boards, the other testimony never specifically negates the testimony quoted above. As Bland's description is plausible, and as Zweig does not deny it, I credit her and find that, on this occasion, Leadperson Zweig removed union literature that recently [that morning, in fact, as we see when the next allegation is summarized] had been posted on some of the company bulletin boards and other property.

(2) Discussion

When Zweig removed the union literature from the bulletin boards, the General Counsel argues (Brief at 35), Fleming "conveyed to employees that they could not engage in protected, concerted activity." Fleming contends there is no violation because Gaither periodically removed the personal items that employees sometimes post, and the General Counsel "never established that Respondent had knowledge of the alleged inappropriate postings, and failed to act on that knowledge by removing the postings." (Brief at 69).

I find constructive knowledge. The evidence shows that, for years, employees have posted personal items on Fleming's bulletin boards, that the items frequently remain there days, even weeks, and that supervisors and managers frequently walk past the posted items. Thus, Gaither's "average" checking time of once a week easily allows for such postings to remain for weeks at a time before, usually, the employee who posted it removes it. [Four business trips by Gaither to the warehouse in one day would allow 4 weeks to pass before Gaither had to tour again in order to meet his standard of once-a-week average.] Moreover, Supervisor Gholston posts production sheets alongside personal items that are posted on the bulletin board in her department. In view of all the evidence, I find that Gaither's "average" checking procedure and Gholston's practice of ignoring personal postings for a reasonable time (that is, for several days) is part of an overall strategy by supervision and manage-

[5] Complaint paragraph 12 alleges removal from the bulletin board "in the break room." As Fleming did not object to the variance, the matter was tried by implied consent as a matter of law. FRCP 15(b).

ment at Fleming. That is to say, it reflects an Fleming's informal, but actual, policy of "see no evil."

What plausible basis is there for this "see no evil" strategy? There is a very good business reason for this strategy—good productivity. And good productivity helps any company to be competitive in its industry. If the business is competitive it has a better chance of surviving, even making a profit, in its business environment. So how does the "see no evil" practice assist in achieving good productivity? Simple. Fleming's employees, as production employees at most plants, want to post these personal items. If Fleming really decided to stop the practice, it could do so easily and quickly—just threaten to fire the next employee who signs the announcement, thank you note, or sales item that gets posted. But if Fleming did that it would get a workforce characterized by resentment rather than by good productivity.

Good employee morale is essential to good productivity. [As we see later when examining the annual evaluations of Stanley Jones, such as GCXs 47 and 48, an entire page, "How Are Things Going?", is devoted to questions about morale and what the employee thinks management could do to improve it.] In short, Fleming's business strategy is designed, I find, to produce and maintain good employee morale—not necessarily because Fleming thinks that is the right thing to do morally, but because it is the smart thing to do to get good productivity. In other words, the strategy is based to meet its business needs, while leaving the written policy (modified in practice) to keep out all organizations and to defend against legal assaults.

Does Fleming's "see no evil" practice as to personal items mean that, when Zweig pounced on the union literature, Fleming acted unlawfully by disparately enforcing [personal items yes; outside organizations, no] its written bulletin board policy? The Government apparently proceeds on the theory that any deviation [such as permitting personal items to be posted] from Fleming's written company business only rule opens the door as to all postings. For years the Board has recognized that an employer does not violate Section 8(a)(1) by permitting "a small number of isolated 'beneficent acts' as narrow exceptions to a no-solicitation rule." *Be-Lo Stores*, 318 NLRB 1, 10–11 (1995) [remanded on other grounds, 126 F.3d 268 (4th Cir. 1997)], citing and quoting from *Hammary Mfg. Corp.*, 265 NLRB 57 at 57 fn. 4 (1982). The *Hammary* exception does not apply here because the "beneficent acts" are more than isolated (although they are by employees, and not by outside organizations such as the United Way or American Red Cross) and because the range of topics of the personal items is broader than merely charitable collections for an employee whose family has suffered a death or fire.

Although not cited by the General Counsel, a recent case stating the no-deviation proposition is *Benteler Industries*, 323 NLRB 712 (adopted by Board, May 12, 1997). The facts there are quite similar to those here, except there the employer made the practice, allowing only personal items to be posted, an express part of the written rule. But under the Board's established rule, any deviation allowing nonwork items to be posted [the test applied, as reflected in *Benteler*, is whether the posted item is work or nonwork] opens the bulletin boards to employee postings of union matters.

The court in *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 321–322 (7th Cir. 1995), distinguishes individual employee action (such as "swap and shop" sale notices) from notices of organizational meetings or activities. In *Be-Lo Stores* the Board distinguished the court distinction in *Guardian Industries* on the basis that the employer in *Be-Lo Stores* permitted much more than "swap and shop" notices, including sales of products of outside organizations, such products including cookies, greeting cards, incense, and oils, plus the distribution of political and religious literature and notices of activities that "communicated ideas." *Be-Lo Stores*, 318 NLRB 1 at 11–12.

In *Be-Lo Stores* the Board does not disagree with the Seventh Circuit's assessment that the Board could lawfully draw a distinction between "swap and shop" notices and announcements of meetings of all organizations. If *Be-Lo Stores* were more recent than *Benteler Industries*, I would not hesitate to write that the Board has modified the no-deviation concept by switching from a work/nonwork test to a test of individual/group activity. The former prevents an employer from permitting the obvious morale-boosting practice of personal item postings, whereas the latter test would allow it. Because *Benteler Industries* is the later decision, I accept the view expressed there as being the Board's continuing position. But if the test were individual/group action, then I would find that Fleming's practice of permitting the posting of personal interest notices does not disparately disfavor notices of union activities, or notices from unions, in violation of Section 8(a)(1) of the Act.

I would so find because, under a test of individual/group action, personal interest notices are all individually oriented and focused by and for employees as individuals, whereas notices by or about unions directly promote group action and support of an outside organization. In our case all postings are individually oriented and focused. No postings pertain to employee clubs or committees. None of the postings involve "communicated ideas." Even when funds are collected to assist an employee, the money is collected for an individual, and the money is not collected by any employee assistance committee or other appointed or elected group. In short, the postings here, including the "swap and shop" notices, are individual in character, involve employees only, and have no focus on promoting activity by employees as a group.

To say "individual" is not to say that the privilege of posting an item of personal interest (as distinguished from the item itself) is unique to the individual doing the posting. This is so because most employees get married [wedding announcements], and most employees who marry will have babies [birth announcements]. Many employees will have grandchildren [and no doubt photos of new grandchildren have been posted]. And, sadly, there will be an occasional announcement that friend, neighbor, and fellow employee has lost a child or is now a widow.[6] The common thread of interest to employees is the emotional bond that people have about the human condition—life, death, and humans sharing the joy and sorrow (and giving

[6] "I have seen babies die; I've been there when the widow cries." Annie Herring, The Master's Hand (1990, album "Waiting For My Ride To Come").

financial assistance as they can) of their fellow humans when these events of joy and sadness occur. Allowing for the expression of these basic human emotions assists in building employee morale (while promoting better productivity) without discriminating against the ability of employees to exercise their rights under Section 7 of the Act. If the law prohibits such personal postings by superimposing a requirement that announcements about unions must be given an equal status, then the ghost of Dickens would surely rise and post on bulletin boards throughout the land Mr. Bumble's quote [paraphrased here], "If the law says that, the law is, well, so unnecessary." C. Dickens, *Oliver Twist* (1837–1839, chap. 51).

Actually, were it not for the rather similar facts in *Benteler Industries*, I would find that posting of personal items and "swap and shop" notices, as described in this case, conform to the Board's work/nonwork test because such items are work related in that the purpose, as I have found, for Fleming's permitting them to be posted is directly related to the success of its business—to achieve and maintain good productivity by promoting good morale of its employees. Overruling *Benteler Industries*, however, is something only the Board can do.

Because *Benteler Industries*, 323 NLRB 712 (1997), appears to be the controlling authority to which I must adhere, I find that as alleged and litigated under complaint paragraph 12 (in conjunction with paragraph 21), Fleming violated Section 8(a)(1) of the Act when Leadperson Mitch Zweig removed union literature from some of Fleming's bulletin boards the morning of March 19, 1997. I shall order Fleming to cease and desist.

c. Danny Gaither

(1) Facts

I need not detail everything here because my view of the governing law, as set forth above, dictates the result.

Alleged discriminatee, and former forklift driver (1:180), Stanley W. Jones advises that he arrived before work the morning of March 19, 1997 with copies of union literature (GCX 33 and 34) which he posted on his Housewares Department's breakroom door and the breakroom bulletin board there (where personal interest items are posted). He also placed copies on the table and chairs in the breakroom. (2:185–188; 5:785). One of the flyers, quoting provisions of the statute and listing "35 Things Management Cannot Do!" (GCX 33; 2:195–196), may be a near duplicate of the "It's The Law!" document described in *Best Lock Corp.*, 305 NLRB 648, 651–652 (1991).

As summarized earlier, Annette Bland observed Leadperson Mitch Zweig gathering and removing the union flyers. He had them rolled up in his hand. After gathering them, Zweig left the Housewares area. This was about 6:10 a.m. (2:260). When Bland saw Zweig a little later that morning, Zweig still had the literature rolled up in his hand and Gaither was with him. They were standing with Jones some 25 feet from where she was situated. Only Gaither and Jones spoke. (2:260–263; 3:330–333).

Human Resources Manager Gaither testified that Zweig and others brought literature to him which reportedly exemplified literature that Stanley Jones was posting on bulletin boards and other company property. Gaither testified that he proceeded out to talk to Jones "to remind him of our bulletin board policy." Gaither had no intention of imposing any discipline. "I just wanted to remind him of our policy." Gaither took Zweig along as a witness. (1:91–92; 7:1187). While a witness at trial, Zweig did not address this event.

Jones recalls that Gaither and Zweig approached him about 7:30 a.m. According to Jones, early in the conversation Gaither asked whether Jones had been posting union literature in "the warehouse." Jones said he had done so in the Housewares breakroom on his own time. Gaither told him not to put up any more in the warehouse, for if he did Fleming would discipline him in some manner "to the point of firing me." Other employees had gathered and were watching the scene. (2:190). As Jones continues (2:189–190):

> At that point I was really not interested in the conversation, so I told them so. I said, "Sir, I'm no longer—I'm not interested in the conversation. I more or less turned my back to do my work and Mr. Gaither continued to follow me.

The episode ended with Gaither's threatening that if Jones posted any more flyers, "You'll see what happens." (2:190).

The chief difference between Gaither's account and that of Jones is that Gaither remembers Jones as speaking to him in a loud voice when asking, several times and in a louder tone each time, if Gaither was threatening him. (1:92). Based on the incident, Gaither prepared a disciplinary interview report (GCX 4) for the personnel file of Jones. Under the topic for what the company expects, Gaither wrote that Jones was to abide by all company policies, particularly the bulletin board policy. Under "Future Action" Gaither wrote, "Possible termination because it would be insubordination at this point." For the facts, Gaither attached a second page. He there records Jones admitting that he had posted union literature that morning on the bulletin boards and walls. The balance of the second page reads (GCX 4):

> GAITHER: I just want to remind you we do have a bulletin board policy here and we do not allow any information or materials to go on our bulletin boards or walls except for company business. If we catch you placing information or any materials on our boards or walls, we will have to take disciplinary action up to and including termination.
>
> JONES: Are you telling me you would fire me for that?
>
> GAITHER: If you continue to violate our policy, Yes.
>
> JONES: (In a louder tone) Are you threatening me?
>
> GAITHER: No, what I am telling you is we have a bulletin board policy and do not allow any literature or materials on our boards or walls except for company business purposes.
>
> JONES: (A little louder) Are you threatening me?
>
> GAITHER: (Reiteration of first response)
>
> JONES: (Still a loud voice) Are you threatening me?
>
> GAITHER: (Reiteration of firs response)
>
> JONES: (Interrupting several times to say) I don't even want to hear this.
>
> GAITHER: You do what you want to do, but if you violate our policy, I will take disciplinary action up to and including termination. Please, do not violate our policies.

According to Annette Bland, whose account is otherwise generally consistent with that of Jones and Gaither, Jones denied posting any union flyers on the bulletin board. (3:333). Of course, Jones essentially admits that he did, as Gaither asserts. I do not credit Bland as to this. Bland testified that she heard Jones ask Gaither, "Are you threatening me?" Gaither replied, "No, I'm not threatening you. I'm just telling you not to put up any flyers in here." (2:261; 3:334–338). Bland recalls that Jones and Gaither were speaking a conversational tone of voice. (3:334). She also remembers that Jones also told Gaither, "Just leave me alone. Get out of my face." (3:339–340). Supposedly, Jones did not appear angry when he said this. (3:369–370).

Gaither testified that no discipline had ever been imposed on anyone previously for violating the company's bulletin board policy. (1:94–95). However, Gaither further testified, no discipline would have issued to Jones had Jones simply acknowledged Gaither's oral notice not to post union literature on company property, including the bulletin boards. Gaither wrote up the incident as a disciplinary interview only because Jones became argumentative, leaving Gaither with the impression that Jones would post such materials again. (1:95; 7:1187).

As the witnesses describe, both sides in the union organizing campaign thereafter posted or distributed campaign literature. As Bland expresses it, "Literature was everywhere." (3:337). [Although not on the bulletin boards. 3:338.] Gaither testified that no employee was disciplined for this. (7:1190–1191, 1213–1214).

(2) Discussion

To the extent the versions differ, I credit the account of Human Resources Manager Gaither. He testified more persuasively, and his version is supported by a contemporaneous file memo concerning the incident. As noted, I do not credit Bland's assertion that Jones did not admit to Gaither that Jones had posted the Union material on the bulletin board. Although Gaither's account does not include the "Get out of my face" portion described by Bland, I credit Bland in that respect. Thus, I find that, while it is possible that Gaither did not hear the statement (possibly because he was turning to leave), I nevertheless find that Jones voiced it for the purpose that Gaither hear it.

Complaint paragraph 11 attacks Human Resources Manager Gaither's March 19 oral threat of discipline for Jones' distributing literature in the breakroom and for posting union literature on a company bulletin board. It does not attack the disciplinary interview placed in Jones' personnel file. [In fact, the basis for that memo was to address the insubordinate responses and attitude displayed by Jones.]

The credited evidence shows that, in the presence of other employees on the warehouse floor [thereby violating his own procedure of giving discipline in the privacy of his office, 7:1190], Gaither orally warned Stanley Jones that Jones could be disciplined, and possibly discharged, if he ever posted "any materials" [this specifically includes union literature because that is what Gaither asked Jones if he had posted] on the warehouse walls or bulletin boards. While the "walls" portion of that warning was not improper, under current Board law (as discussed respecting the previous allegation) Fleming could not lawfully prohibit employees from posting union materials on the bulletin boards because, as I have found, it knowingly has permitted employees to post personal items, including "swap and shop" notices, on the bulletin boards.

Because I am bound to apply existing Board law, I find that Fleming violated Section 8(a)(1) of the Act (complaint paragraphs 11 and 21) when Human Resources Manager Danny Gaither warned forklift driver Stanley Jones of possible discipline, including possible termination, if he did any further posting of [nonwork] materials on any of Fleming's bulletin boards. [Indeed, had Gaither's oral warning been for the insubordinate nature of Jones' responses, rather than warning of possible discharge if he ever again posted any materials on the bulletin board, there would have been no violation.] I shall order Fleming to cease and desist from such warnings unless and until it notifies its employees, in writing, that personal items, including "swap and shop" sale items, also may not be posted and that any employee who does so will be subject to discipline up to and including discharge.

5. June 3, 1997—plant closure threat by Russ Hill

a. Introduction

About June 3, 1997, complaint paragraph 13 alleges, Division President Russ Hill threatened employees "with plant closure if the Union was selected to represent" the employees. Fleming denies. Order Selectors Verna Brown (3:399) and Marilyn Lipford (3:419) testified in support of the allegation, and Distribution Manager Mark Aldridge (7:1305) testified in opposition. Recall that the election was conducted on (Wednesday) June 4, 1997 (2:182–184), and that Russ Hill left Fleming in late December 1996 when Fleming eliminated the position of Division President (1:71, 73, 79; 7:1307).

The witnesses agree that Division President Hill delivered a speech to employees on, or about, June 3. Distribution Manager Mark Aldridge also spoke. They also agree that Hill read from a prepared text. There is disagreement concerning what Hill said. No party offered the text of Hill's speech into evidence.

b. Facts

Verna Brown testified that nearly 100 employees were present, as were Hill, Aldridge, Human Resources Manager Gaither, and Supervisor Rose Gholston. Hill, Brown testified, told the employees that "it was coming to the ending of the thing about the Union where we vote and he was just telling us if we voted for that, you know, he was showing us where the company would go in the hole and the place might close down and stuff like that. They were like—you know, it was kind of like[7] they were pleading their side, you know." Brown recalls that Hill spoke for about 15 minutes. (3:399–401, 410–412).

Marilyn Lipford recalls only about 10 or 15 being present at the meeting (or at least at the meeting she attended), with Hill, Aldridge, and Gaither also present. In reading his two to three

[7] At various places in the record, and with different speakers, the typist for the court reporting service has substituted "kindly like" for "kind of like."

page text, Hill said that other divisions that were union had closed and that if the Union came in "it's a possible chance that ours could close.' Something to that extent, yes." She does not recall whether Hill explained why he thought that might happen. (3:421–422).

Lipford recalls that Aldridge also spoke. During Hill's reading, Lipford testified on cross examination, Hill said the Division had been losing money. He referred to other divisions, some union some nonunion, that had closed. Respecting the Memphis GMD, Hill said it was on a list of several more which would be closing "and if the Union got in it was a possible chance that it will be closed." Lipford concedes that such is "probably not exactly what he said, but that's the way I understood it to be." [I find that to be the equivalent of stating that it is her best recollection of what Hill said.] Although Lipford does not recall Hill's saying, "With or without the Union our jobs and our existence in Memphis is [are] squarely on the line," she states that he "could have" said it. (3:423–426). [This last item is mostly meaningless because no witness testified to that which Lipford concedes Hill "could have" said. Hill "could have" said many things in 15 minutes. The General Counsel put on positive evidence concerning some of the things Hill did say. It was up to Fleming to rebut that evidence, if it could.]

Mark Aldridge testified that Russ Hill described the Division's economic condition, stating that for years it had lost money. Hill did not tell the employees that if the Union won the election the facility "would" close. Hill, Aldridge continues, reported that other divisions, union and nonunion, were being "looked at" [apparently for possible future closings], and that other Fleming divisions, but not GMD divisions [as Memphis is], closed in the past had been both union and nonunion. (7:1314–1316).

c. Discussion

The message which Division President Russ Hill conveyed to the employees on June 3, 1997, as described by the employees, is that the Division was losing money, and had been for years. Other Fleming divisions, union and nonunion, had closed, but [as Aldridge testified Hill said] no GMD divisions. However, if the employees voted in the Union, the Division "would go in the hole and the place might [Brown; or "could," Lipford] close down.

Distribution Manager Mark Aldridge's very limited testimony about the speech does not dispute the foregoing description. [Although he denies that Hill said "would" close, that is not the statement of the employees.] Indeed, his limited description generally is consistent with that of the employees.

As can be seen, Hill cited no objective evidence linking a vote for the Union to market or economic forces that would translate into a "might" or "could" closure of the Memphis facility. It is immaterial that Hill said "could" or "might" rather than "would," for the impact of the message reasonably would be that voting for the Union could result in closure of the Memphis facility (and loss of all jobs). No explanation was given as to why the other divisions closed, and, as just noted, no explanation—aside from voting in the Union—was given as to what could cause Memphis to close. That blatantly and directly [no objective conditions listed, much less explained] links voting-in the Union with possible closure of the facility. Such a message is unlawfully coercive.

In view of the foregoing, I find that, as alleged, Fleming violated Section 8(a)(1) of the Act, as alleged (complaint paragraphs 13 and 21), by the June 3, 1997 speech delivered by Division President Russ Hill.

D. Alleged Acts of Discrimination

1. Stanley W. Jones

a. Introduction

The complaint alleges that Fleming twice violated Section 8(a)(3) of the Act respecting Stanley Jones—first, by suspending him on June 25, 1997 (complaint paragraph 17) and, second, by discharging Jones on September 18 (complaint paragraph 19). Admitting the fact, Fleming denies that such suspension and discharge of Jones violated the Act. Much of the record is devoted to these two allegations.

The General Counsel's theory is simple: "On March 19, 1997, Gaither threatened to discharge Stanley Jones because he posted union literature on the bulletin board. Gaither's threat came to pass on September 18, 1997, when Respondent fired Jones." (Brief at 38). Contending that Fleming tolerated what management, for several years, had viewed as loud, rude, abusive, and even hostile behavior on the part of Jones before the Union showed up, the General Counsel argues that it was Jones' support of the Union, not his assertedly hostile conduct, that prompted Fleming belatedly to get serious about disciplining him. The move to get rid of this 21-year employee began with the March 19 threat, was unmistakably signaled by the June 25 suspension (which culminated in a final warning on July 2), and ended with his discharge on September 18, 1997.

Presenting a different perspective, Fleming contends that Jones, rather than being the peaceable person respectful of authority as he claims (2:204, 207), developed, over the past several years, a confrontational approach toward and disrespectful response to supervision. Thus, in 1997 when a leadperson, supervisor, or manager approached Jones merely to remind him of a company policy, Jones' conduct would escalate the incident from a mere informal reminder into an insubordinate confrontation resulting in discipline progressively more serious. In effect, Fleming contends that Jones fired himself.

Pointing to Jones' stuttering problem and his difficulty in sometimes expressing himself (2:240), the General Counsel argues (Brief at 39) that, in a pivotal conversation on September 18, Leadperson Robert B. "Bobby" Marston interrupted Jones and tried to cut him off, as Jones testified. (2:241). "The tape [GCX 36, side 1, 5th and last conversation; GCX 60, side A; GCX 37 is transcript] of the conversation supports Jones' assertion. [A half truth. What the tape shows is that Jones and Marston interrupted each other.] Jones did not believe his manner or tone were disruptive. He was simply flustered and frustrated by his inability to communicate. What Respondent apparently perceived as hostility can be attributed to stuttering. It is unfortunate that while Jones did not think he was rude or hostile, managers perceived him that way." (Brief at 39).

What is "unfortunate" is that the General Counsel does not recognize how silly this argument is. It is silly because it is so unfounded. And in the process of demeaning Jones (by suggesting that he has to have the crutch of being a victim of discrimination against stutterers), the Government's argument implies that the discrimination is not union based. In fact, the record clearly shows that Jones had no problem expressing himself. [Not succinctly, perhaps, because, at least at trial, he had a tendency to ramble, and the rambling had nothing to do with stuttering.] Jones' stuttering problem had nothing to do with his discipline problem. As for expressing himself, the record shows, and I find, that Jones had a tendency to express himself when he should have kept quiet and accepted simple reminders [with no discipline intended until Jones' insubordinate conduct would ignite a controversy] that leadpersons or members of management were trying to give him.

As one of his coworkers, Receiving Clerk Deborah Grandberry, a 21-year employee (7:1169) expresses it (7:1172–1173), Jones can fan a small flame into "a giant fire." Jones claims that on the job he tries to avoid confrontations and argumentative situations (5:796–797), yet he admits (2:241), "I'm the type person if I see a situation that I feel is wrong, I don't think it's wrong for me to ask a question about it." Yes, and rather than yielding to leadpersons or managers on small matters [as the saying goes, "The boss may not be right, but he is always the boss."], Jones vigorously pursued his habit of debating, to the point of loud insubordination, even the smallest of matters with leadpersons and management. To the extent that Jones was permitted to develop this confrontational mode over several years without being disciplined, all that changed when Mark Aldridge arrived and took charge of distribution.

Also, we must not lose sight of the fact that for some 15 years Jones had been a good employee. Many employers will cut some slack for a 15-year employee, and avoid imposing discipline right away. Evaluations will state a need for improvement. Receiving Clerk Grandberry asserts that she got along fine with Jones (as she does with all others, 7:1173) and that he was a "real nice guy" until about 1995. (7:1178–1179). Similarly, 21-year employee Peggy Cates, who has been the distribution secretary for 18 years (5:828), testified that initially Jones was a "nice person" and, so far as she knows, he got along with everyone until about 1993. She does not know what happened to bring about the change for the worse in his conduct and attitude, but, for example, he began to complain that everyone was "picking on" him. Her first taste of that occurred in about 1993. Jones was in the office to pick up his check and that of another person. When Cates informed him that, by the rules, she could not turn over another employee's check to him, Jones became angry and upset, saying that "Y'all is picking on me." When Cates assured him that no one was picking on him, he "slung the door open and went out." (5:832–834).

As for Jones' annual evaluations, his first three in evidence (GCXs 44, 45, 46), covering (approximately) annual periods from February 1990 to January 1993, show generally good marks, with the exception of attendance (tardiness and some absenteeism). Significantly, in the spaces for the employee's remarks, Jones' remarks are generally positive and upbeat about everyone, including the employer (Malone & Hyde in those years). Note that for the first of those evaluations, February 1990 to February 1991 (GCX 44), the reviewing supervisor was Mark Henry (4:548), later to become the warehouse manager. Henry supervised Jones for several years and had no problems. (7:1158–1159). Jones fared well under a new supervisor for the June 1991 to June 1992 evaluation (GCX 45), and under a third supervisor for the period of about June 1992 to January 1993 (GCX 46).

But now clouds begin to form on the horizon. Under a new supervisor, Rick Daugherty, for the review period of January 31, 1993 to January 31, 1994 (GCX 47, Malone & Hyde), several negative comments are entered, and the accompanying remarks of Jones also show some dissatisfaction creeping in. Daugherty asserts that Jones "could work better with others," faults his attitude toward his coworkers, and writes that Jones "needs to work on cooperating with coworkers, and strive to improve his productivity." Among his remarks, Jones states that management could improve morale by not showing favoritism.

By a file memo (RX 31) dated April 21, 1994, Supervisor Marty Fennell, filling in at the time for Daugherty (7:1208, Gaither), describes an incident in which he found Jones reading a newspaper rather than working. When Fennell asked Jones to resume working, Jones said he was waiting on a pallet. Fennell said that was fine but not to read the newspaper. Jones then stated that Fennell was "picking on" him. Fennell denied that he was, asserting that he was watching everyone. In any event, Fennell added, it was Jones who was "reading the paper."

If Daugherty and Jones did not get along well, their relationship no doubt really soured in June 1994. As described in a June 15, 1994 file memo (RX 4) by Daugherty, Daugherty stopped Jones as the latter was starting to leave about 3 p.m. Apparently there still was work to be done. According to the memo (disputed by Jones at trial, 5:793, 815–820), Jones became angry, disruptive, and "threatening." The next evaluation (GCX 57, 1/94 through 1/95; 5:791, with Fleming the employer) reflected this. Thus, "His [Jones'] attitude towards associates and management is hostile and threatening. These areas were addressed in Stan's last performance review." Also, "Stan's performance is unsatisfactory. He must learn to cooperate with associates and management." Jones denies having threatened anyone. (5:792). For his part, Jones did not enter any remarks on the evaluation.

At some point in 1995, apparently, Arthur Williams Jr. took over as Jones' supervisor, and he did the January 1996 evaluation (GCX 48). Williams was Jones' supervisor in 1996 (2:180) until about September 1996 when Williams was transferred to Shipping. (6:1093, Marston). In the January 1996 evaluation, Williams gives Jones good marks for most everything but quantity and attendance, and quantity is adversely affected because Jones was helping others. Williams writes, "Stanley is a valued long service associate who knows his job very well." For his remarks on the employee form accompanying the evaluation, Jones has several no comments or "no opinion." These range from whether he is proud to work for the company, whether his pay is fair for his job, whether he has a clear understanding of company policies and benefits, whether the company cares for its associates, whether he has confidence

in the company's leadership, and whether substance abuse of drugs or alcohol is not a problem in the facility. On the other hand, Jones checks agreement with several of the positive items, including number 18, "I can express my honest feelings at work without fear of punishment," and 7, "In my area, associates are disciplined fairly." He marked disagreement on item 11, "I am satisfied with the total benefits package here..." and 16, "I have job security with this company." On the form for rating morale of himself and employees, and how it could be improved, Jones made no entries.

Although there is no (assumed) January 1997 evaluation in evidence, there is one bit of "evaluation" occurring in 1996 which is of record. At Jones' request (2:167), Human Resources Manager Gaither wrote a "To whom it may concern" letter (GCX 31) of recommendation for Jones. After an opening paragraph briefly describing Jones' work history, the April 4, 1996 letter reads (emphasis added):

> Stanley knows his job requirements well, is fork lift certified, has a neat personal appearance *and possesses a calm quiet demeanor*.
>
> Stanley has expressed a desire to explore other employment opportunities. I feel Stanley has outstanding potential and could be a positive asset to an organization.
>
> If I may be of further assistance, please let me know.

Although claiming that he takes his recommending letters seriously, and that they are truthful (2:165–166), Gaither nevertheless hedges by asserting that the reference to "outstanding potential" really means that something is "lacking." As to Jones, "I didn't want to downplay him so I just say he has potential." If we were to read other such letters we would see, Gaither assures us, that he has described the employee in terms of, for example, "outstanding attendance" and "cooperates with others." (2:168). Fleming apparently could not find any of these other letters, for it did not offer any. Nevertheless, I find that Gaither indeed did not want to downplay Jones, and went so far as to be misleading about a "calm quiet demeanor" in the hope that the letter would assist Jones in finding employment elsewhere.

I say "misleading" because while Jones probably still did display a "calm quiet demeanor" in a casual conversation or atmosphere, any conflict at all, especially with a leadperson or manager, could cause Jones to erupt. And Jones' personnel file [and Gaither is the custodian of the personnel files, 1:75; 2:156], as of April 1996, had some documentation as to this. On the other hand, the most recent evaluation was by Supervisor Williams, in January 1996, and Williams gave Jones mostly good marks. (GCX 48) Thus, in preparing his letter, Gaither was faced with something of a mixed work history on the part of Jones

As we turn to the suspension (and final warning) and discharge, note that those disciplinary actions arise from trivial incidents. [That is, the initial part of the incidents was trivial. The insubordination which followed was serious.] The former was sparked over an extended use by Jones of a pay telephone during working time and Jones' arguing when Warehouse Manager Henry intended merely to remind Jones to follow company policy. The latter developed over Jones' arguing with Leadperson Bobby Marston about repositioning some freight. As Receiving Clerk Grandberry expresses it, "all he [Jones] had to do was just go" and move the freight. "You know, lift drivers make that mistake all the time. . . . and all he had to do, really, was go and just move the freight." (7:1174). Indeed, Lift Driver Annette Bland, seeing an argument between two union supporters (Jones and Rodney Jackson) such as herself, decided to go move the freight herself, but by that time it was too late because Jackson had already called his leadperson to resolve the matter. (2:287, 290; 3:352).

b. Suspended June 25, 1997

(1) Facts

(a) The telephone call incident

For many years individual employees at Fleming have stopped work briefly to make short [a posted sign instructs employees to limit calls to no more than 3 minutes, (3:345–346, Bland)] personal calls on pay telephones during working time without first obtaining their supervisor's permission. They have done so despite a rule which provides (Rule XI.4; GCX 3):

> 4. Pay phones are provided for your personal calls during breaks and lunches. Use of the phone outside of these times requires your Supervisor's approval.

As Warehouse Manager Henry testified (6:1123; 7:1154–1156), it is "pretty standard" practice among the supervisors, and himself, that no employee is written up for short calls even during working time. The emphasis is on "short." As Henry rather vividly expresses it (6:1123):

> A minute or two [during working time] I can live with, but when you're on the phone for 18 to 28 minutes and the Warehouse Manager sees that [then] you've [management] got to address it or it's open season for everybody.

On Wednesday, June 25, 1997, Stanley Jones stopped work to use one of the pay telephones to call his wife at her place of employment. Jones was placed on "hold" for a time waiting for his wife to come on the line. During his wait he saw that Warehouse Manager Henry was observing him. Eventually Jones spoke with his wife. According to Jones, he was on the telephone "no more than about 5 minutes." He pegs the time he placed the call at about 11:15 a.m. with the completion time being about 11:20 a.m. During part of this time another employee, Rodney Jackson, was on the telephone next to Jones. The purpose of Jones' call was to ascertain when his wife would be getting off work, and to alert her, apparently, that he would not have to work beyond his normal 2:30 p.m. end of shift. (2:198–199; 5:759–762). Jones' lunch period was scheduled to begin at 11:30 a.m. (7:1150).

Warehouse Manager Mark Henry testified that as he walked out of the Distribution Office about 11:10 a.m. he met Leadperson Mitch Zweig who informed him that Jones had been on the telephone for some 10 minutes. [During his own testimony, Zweig did not address the matter of his having observed Jones on the telephone for 10 minutes or of his having reported this to Henry.] From where he stood, Henry could see Jones on the

telephone. Henry decided to observe. After 10 minutes of observing, Henry left to find Robert B. "Bobby" Marston, Jones' leadperson. Ascertaining that Marston was at lunch, then seeing Jones hang up at 11:28 a.m., and concerned about the length of the call, Henry decided to talk to Jones himself. (6:1106–1109; 7:1147–1148). Significantly, Henry's purpose in approaching Jones was not disciplinary. Concerned about the length of time Jones was on the phone (6:1123; 7:1148, 1154, 1156), Henry merely wanted to ascertain whether a supervisor or leadperson had approved of such, and if not, to tell Jones to be sure and clear it in the future. No discipline would have issued. (6:1122–1123; 7:1148–1149). On the warehouse floor with Jones, Henry never got a chance to discuss with Jones the excessive time that Jones had been on the telephone. (7:1156).

As between Mark Henry and Stanley Jones on the timing issue, I credit Henry who impressed me as a more believable witness. Moreover, as we see shortly, Jones admittedly (2:203–204; 5:771) lied to management concerning whether he was tape recording a meeting with them on June 26. While Jones' desire to tape the meeting, so that the tape could be his witness, is understandable, I also must weigh the fact of the falsehood when resolving credibility on issues that affect the interests of Stanley Jones.

(b) The meeting of June 25, 1997

Having credited Warehouse Manager Henry concerning the length of time he observed Jones on the telephone, I also credit his version (6:1109–1116; 7:1148–1149, 1156, 1160, 1164–1165; RX 21) of the ensuing conversation between himself and Jones which occurred not far from the Receiving office. Although I generally do not credit Jones respecting his version (2:199–201; 5:762–767; 7:1339), at places Jones' version is consistent with Henry's. In summary, on this occasion Henry approached Jones and asked whether he had asked "Bobby" [Leadperson Marston] whether he could use the telephone. Rather than answering the warehouse manager's question, Jones responded with his own question [a rather typical tactic of Jones] of, "Bobby. What's Bobby?"

Jones' response, of course, was sarcasm. At trial Jones concedes that, at the time, he was well aware of the company's preelection position that Marston was a leadperson and eligible to vote in the election. (2:200; 5:765). Apparently the Union challenged the ballots of the leadpersons such as Marston. Just 3 weeks earlier Jones had served as one of the Union's two observers at the election. Jones' responding question was a sarcastic effort to bait Henry into a debate over whether Marston's title was really that of "leadperson" or, as originally announced, "supervisor." From there the conversation went downhill with Jones being argumentative, accusing Henry of harassing him and, eventually getting up close to Henry's face and telling him, in a loud voice, "Don't do it" before Jones turned and began walking away. Henry told the receding Jones that Henry would ask any employee a question about company matters. Henry then walked into the adjacent Receiving office for a moment, gathered his thoughts, and stepped back onto the warehouse floor. Jones then reappeared and, coming to within about 6 inches of Henry's face, told Henry, "And get out of my face!"[8] Henry had not been "in" Jones face. Henry told Jones to come with him to the Distribution office. When Jones asked why, Henry had to tell him again.

The Distribution office is in the center of the warehouse. (1:102). Distribution Manager Mark Aldridge has his office in the Distribution office, and his secretary, Peggy Cates, sits outside Aldridge's office. As Henry started to enter the office of Mark Aldridge, he told Jones to have a seat outside Aldridge's office. Instead of doing so, Jones followed behind Henry so that Henry could not close the door. Jones complained that it was his lunch period. Observing what was happening, Aldridge told Jones to have a seat outside, that he would receive his full lunch period. (7:1324–1325). After Henry briefed Aldridge on his encounter with Jones, Jones was called into Aldridge's office. Present were Jones, Henry, and Aldridge.

According to Jones, he tape recorded the ensuing session in Aldridge's office. (5:769–770). No such tape was identified or offered, along with an authenticated transcript, into evidence. Nevertheless, the General Counsel (Brief at 14) cites "Tr. 770, G.C.-R53" with the reference to "G.C.-R53" evidently being a contention that GCX 53 (rejected at 7:1334) contains the June 25 conversation in Aldridge's office. Not according to Jones, for he testified that one side (side A, presumably) contains the meeting of June 26 and that the other side has the [final warning] meeting of July 2. (7:1339–1340). Moreover, GCX 53 (rejected) was not offered for that purpose. [As I mention again in a moment, it was offered at the close of the Government's rebuttal to impeach (someone about something) respecting, apparently, the meeting of June 26. 7:1339–1344.].

The June 25 meeting was mostly preliminary to the investigation which followed. I do not credit Jones' version of the June 25 meeting. Actually, it appears that Jones' memory has tricked him so that he misplaces some of the topics and exchanges between the meetings of June 25 and June 26. I credit Fleming's version because Fleming's witnesses (Henry, 6:1117–1119; Aldridge, 7:1325) appear more reliable. Actually, Aldridge made notes of the rather short meeting, and his notes appear to be the most complete account. Aldridge's notes (picking up with the first words spoken in the meeting) for the session read [I have substituted surnames] (GCX 66):

> ALDRIDGE: Mark [Henry] has explained to me some very disturbing things about your conversation with him.
>
> JONES: He could tell you anything.
>
> ALDRIDGE: Stanley, it is my understanding that Mark asked you if you had the OK from anyone to be using the phone during working hours.
>
> JONES: Other people use the phone and I'm not sure if they ask.
>
> ALDRIDGE: Stanley, all you needed to do was answer the man's question. Instead you are trying to make an is-

[8] The General Counsel (Brief at 14 fn. 15) quotes Annette Bland's testimony about hearing Jones telling Henry, "Get out of my face," but (3:372) Jones was not threatening and seemed tired of being harassed. Bland's testimony (3:339, 369-370), as I discussed earlier, referred to the bulletin board incident of March 19 with Human Resources Manager Gaither, not to this event of June 25.

sue out of a simple question. In fact your action was insubordinate.

JONES: I wasn't insubordinate. All you guys are doing is harassing me. What about the time when Bobby [Marston] pointed his finger at me or when Wayne Jordan cussed at me. You didn't do anything with them.

ALDRIDGE: Stanley, once again you refuse to talk about the issue at hand in a calm manner. Just have a seat outside my office.

I then called Danny Gaither and explained to him what was going on. The decision was made to send Stanley home to allow him to cool off and to allow time for further investigation. I called Stanley back into my office. Gaither joined the meeting at this point. I told Stanley to clock out and to go home. I asked him to return tomorrow to the distribution office at 10:00 and we would continue our investigation.

Jones' reference to Marston's pointing his finger at him [and supposedly saying he was sick and tired of him] and Jordan's cursing [a vulgarity, actually] him are side issues of very limited relevance, if any. It is unclear that Jones, at the meeting, said much more about these items than what Aldridge describes in the notes quoted above. At trial Jones describes the incidents at some length. His complaint to Aldridge at the meeting is that when Jones complained about the matters, Aldridge did not punish the men. On cross examination Jones concedes that, on the Jordan matter, Aldridge investigated by calling in both men, listening to them [Jones admits that Jordan denied Jones' allegation of cursing him], and asked if they could work together. They assured Aldridge that they could. Incident closed. Jones also concedes that the Marston matter went before Warehouse Comanager Strait (along with Marston's version). The outcome is not clearly specified in the record. Apparently, however, Strait was faced with different versions and his resolution, whatever it was, did not satisfy Jones. There is no evidence that the matter was ever submitted beyond Strait to Aldridge. Jones, it appears, is not satisfied with industrial due process, but only with triumph.

Henry credibly asserts that Jones was loud throughout [the rather short] meeting of June 25. (7:1165). Distribution Secretary Peggy Cates confirms that Jones not only tried to push his way into Aldridge's office, but that she heard him "yelling" during the meeting, and that when Jones left, he "slung the door back" as he came out. (5:840–841). Suggesting that Cates is unworthy of belief, the General Counsel (Brief at 37 and footnote 21) asserts that a comparison of the tape ("G.C. Exh.-R.53") "demonstrates that no voices were raised." The General Counsel then renews the Government's [tardy and incomplete] impeachment offer (7:1339–1341, 1344) of GCX 53 (rejected),[9] but this time only for the purpose of hearing the tone [and level] of the voices on the tape, and "not for its content." As noted above, the claimed tape for the June 25 was never marked, identified, authenticated, or offered, much less received. As noted above, Stanley Jones testified that GCX 53 (rejected) has the recorded meeting of June 26 in Aldridge's office, and that the other side contains the July 2, 1997 [final warning] meeting in Aldridge's office. (7:1339–1340). Accordingly, as the evidence which the Government desires to offer for impeachment is not part of the record, I deny the General Counsel's motion.

(c) The meeting of June 26, 1997

Turn now to the meeting of Thursday, June 26, 1997. Aldridge's three-page set of notes (GCX 67) begin by listing the names of those present: Stanley Jones, Mark Henry, Danny Gaither, (and Mark Aldridge). As already discussed, Jones tape recorded (GCX 53, rejected) the meeting. (2:204; 5:769). Although the tape is not in evidence, any offer of such a tape raises a question whether an evidentiary bar should be imposed (or not imposed because a request for a witness was denied). Compare *Opryland Hotel*, 323 NLRB 723 fn. 3 (1997), respecting reinstatement and backpay. I need not address the evidentiary bar issue because the tape is a rejected exhibit. (GCX 53, rejected). Potentially, however, reinstatement and backpay could become issues. Unlike the employer in *Opryland Hotel*, Fleming had a rule prohibiting tape players in the work area. The rule, XVII.1, "Radios, Tape Players, Cellular Phones," reads (GCX 3 at 5):

> Distribution jobs require full attention, therefore radios, tape players, cellular phones, etc. are not allowed in the work area. In addition, it is important that you be able to hear approaching forklift trucks and electric pallet jacks.

The ostensible purpose of the rule clearly is threefold: One, to promote the quantity and quality of production by eliminating the distraction generated by the types of devices specified; Two, to maintain a safe working environment by banning those devices, and Three, to achieve these goals in the work area. Note that the rule does not prohibit possession of such devices anywhere on the company's premises (such as a lunchroom or parking lot), but only in a "work area" and for the purposes specified. A tape player plays (distracting) music, but a tape recorder generally is not used to play music. Nevertheless, I assume at this point that a tape recorder, which is similar to the listed devices, would be included under the "etc." classification because attention to setting it, turning it off or on, or loading a recording cassette, could be a distraction and a safety hazard. [Vessie Reynolds asserts that her use of a tape recorder never interfered with her work (5:738–739), but she does not address the safety issue.] Finally, would Aldridge's office be considered as a "work area" under the rule?

Although Fleming, on brief, does not address this issue, it could be argued that Aldridge, by asking whether Jones was taping the meeting, impliedly was stating (1) that a tape recorder is covered under the rule; (2) that his office is a "work area" under the rule, and (3) that Jones could not have a tape recorder (much less secretly record the meeting) in his possession in Aldridge's office. A counter argument could be that the rule, as then written and interpreted, (1) addresses production and safety concerns, and neither of these are involved when an employee is meeting with management in a manager's office,

[9] Other than a general claim that the tape would rebut "the conclusions and the testimony of at least one of Respondent's witnesses" (7:1340), the General Counsel never specifies who would be impeached and as to what specifics.

and (2) the manager's office, for those same reasons, does not qualify as a "work area" under the rule.

As this matter was not litigated, I need not devote further attention to it. Clearly Fleming did not undertake to show that, even if it is found, prima facie, to have been unlawfully motivated in the disciplinary actions against Stanley Jones, an order for reinstatement would not be proper because Jones' conduct in secretly tape recording the meetings of June 26 and July 2, 1997 [not to mention the discharge meeting of September 18, 1997] was conduct for which Fleming (had it discovered the conduct before September 1997) would have discharged Stanley Jones in any event. Accordingly, I now address the meeting of June 26, 1997.

Again, with one exception, the most reliable record evidence of this meeting appears to be the notes taken by Aldridge. As his notes begin, present were Stanley Jones, Mark Henry, Danny Gaither, and Aldridge. The first question, as shown below, asks about a tape recording. Before that, however, and the exception I mention above, Jones asked if he could bring in someone he trusted from the warehouse as his witness. He was told no. Gaither even asked if Jones wanted "to go home?" Jones said that was up to them, that they had told him to be there. (2:203). Because it is quite plausible that Jones would have asked for a witness, and as none of the management witnesses denies this, I credit Jones as to this. I also credit him respecting the second part because it is a possibility and, again, none of the management witnesses, including Gaither, denies it. Aldridge's notes read (GCX 67, with a few minor changes in spelling or punctuation):

> ALDRIDGE: Stanley, before we begin, are you recording our conversation? [As Henry explains, Jones was carrying a briefcase. 6:1120.]
>
> JONES: No I'm not, are you?
>
> ALDRIDGE: No.
>
> ALDRIDGE: Yesterday it was quite obvious to me and others [that] you were upset and would not settle down and answer the questions being asked. That is why you were asked to clock out and go home. Today we will be asking you questions about yesterday and I expect you to tell us exactly what took place. Yesterday while you were on the phone were you on the clock and about what time was it?
>
> JONES: Yes, I was on the clock. I'm not sure of the time.
>
> ALDRIDGE: Was your call an emergency?
>
> JONES: Yeah.
>
> ALDRIDGE: Someone notified you that you had an emergency phone call?
>
> JONES: No, it was just an emergency to me.
>
> ALDRIDGE: So no one gave you the ok to use the phone on company time.
>
> JONES: No, no one has ever told me I had to ask. I never have and I have never seen anyone else ask.
>
> ALDRIDGE: Are you familiar with the policy book? (I handed Stanley a copy.)
>
> JONES: Yeah, I have a copy that Danny Gaither gave me. I'm not sure what year it is, [it] may be the 1996 version.
>
> ALDRIDGE: Have you read the book and understand it?
>
> JONES: I have read the book.
>
> ALDRIDGE: What does section 11 number 4 state?
>
> JONES: Pay phones are provided for your personal calls during breaks and lunches. Use of the phone outside of these times requires your Supervisor's approval. [GCX 3 at 4, rule XI.4.]
>
> ALDRIDGE: So the policy book does explain phone usage?
>
> JONES: Yeah, I guess so. But I have a question. Is Bobby Marston my supervisor?
>
> ALDRIDGE: Bobby is the leadperson who oversees receiving.
>
> ALDRIDGE: Now, after Mark [Henry] approached you about being on the phone, what took place?
>
> JONES: He asked me if I had permission to be on the phone. Then I asked if I needed to [have permission].
>
> ALDRIDGE: Was that all?
>
> JONES: I asked Mark why he is harassing me. Mark is always trying to harass me. Like the time an associate came up to me to talk about something and Mark told me to go back to work.
>
> ALDRIDGE: The example I think you're referring to I gave Mark the directive to break up the conversation because the other person was off the clock and the conversation had gone on for some time.
>
> JONES: Oh yeah? Who was I talking to?
>
> ALDRIDGE: I don't recall. The conversation was taking place on the front dock.
>
> JONES: What door was I sitting at?
>
> ALDRIDGE: That's enough of that. Let's get back to the matter at hand. What else was said?
>
> JONES: I think Mark said that he wasn't harassing me. He then said something about me knowing the rules. Then I started to walk back to my forklift and he followed me on his tugger almost hitting me. I then told him that I didn't want to hear any more of this. That is when he told me to come to the office and I asked him for what reason? He just said, "Come on let's go."
>
> ALDRIDGE: Was there anything else?
>
> JONES: No.
>
> ALDRIDGE: Stanley, did you say to Mark, "Get out of my face" and "Don't do it any more"?
>
> JONES: Not that I recall.
>
> ALDRIDGE: Your conduct towards Mark, do you think it's OK?
>
> JONES: Yea.
>
> ALDRIDGE: With the questions I just asked you and the answers you just gave me, do you feel there is anything more you would like to add.
>
> JONES: Why wasn't the other person on the phone talked to?
>
> ALDRIDGE: Who was that?
>
> JONES: I know but I would prefer not to say.

ALDRIDGE: Stanley, it is [in] your best interest to tell us everything.

JONES: Well, Rodney Jackson was on the phone.

ALDRIDGE: Was it during the same time that Mark was talking to you about.

JONES: I'm not sure. I think so.

ALDRIDGE: I have nothing else at this time if you don't. We have a very serious issue here to address. Go on home and we will get back with you on our decision after we have completed the investigation.

JONES: Am I fired?

ALDRIDGE: You are relieved of duty pending further investigation.

Following the meeting the managers, or at least Henry, investigated further. This included Henry's interviewing several employees and supervisors, including Supervisor Arthur Williams (by trial, no longer with Fleming) who mentioned the 1994 incident between supervisor Rick Daugherty (also no longer with Fleming). Henry, with Dennis Strait present, also interviewed Rodney Jackson. (1:72; 6:1121; 7:1157, 1161–1164).

From Jackson Henry learned that Jackson, who carries a pager, had received a call on his pager and had gone to the telephone about 11:12 a.m. for about 2 minutes. Jackson reported that Stanley Jones also was on the telephone, and that Jackson had not seen Henry. Henry informed Jackson that he needed to check with someone before using the telephone. Jackson said "No problem, I understand." Henry documented the July 1 interview by a one-page memo (RX 23) of that date. (6:1121–1122; 7:1160–1168). Henry had observed Jackson wearing union insignia during the preelection period. (6:1123–1124). No discipline was imposed on Jackson (3:440, Jackson) because, Henry testified (6:1122–1123; 7:1149), "a minute or two I can live with . . . ."

Jackson confirms the essentials of Henry's description, adding that he was paged about 11:05 a.m., was on the telephone 2 or 3 minutes, and got off the telephone about 11:11 a.m. As Jackson recalls, he and Jones approached the telephones at the same time. They stood side by side at telephones. Jones remained on the telephone when Jackson returned to work. (3:433–435, 439–441).

With Jackson's July interview the final step in the investigation (6:1124), management then met to decide what action to take. (6:1126–1127). Leaning toward discharge were Gaither, Aldridge, and Division President Hill. Henry recommended giving Jones another chance, citing his own experience of supervising Jones for several years with no similar problem. Based on Henry's recommendation, the group decided against discharge. (6:1126–1129; 7:1197). Jones was called to return for a meeting the following day, July 2. (2:205; 5:774), Jones).

(d) The final warning of July 2, 1997

In a meeting held July 2 with Gaither, Henry, and Aldridge, Jones was given a "Final Warning," which Henry read to Jones. (2:206–209; 5:774–776, Jones; 6:1125–1126, 1129, Henry; 7:1138, Aldridge; GCX 16). As noted earlier, Jones testified (5:774; 7:1339–1340) that he taped this meeting and that such is recorded on one side (side 2, or B, presumably) of GCX 53 (rejected). The text of the final warning reads (GCX 16):

> *CIRCUMSTANCES;*There have been numerous documented instances of wasting time and disrespectful behavior by Stanley Jones. On June 25, 1997, Stanley Jones was observed for several minutes talking on the phone while he was on the time clock and while he should be working. Per our policy, use of the phone outside of breaks and lunch requires approval. Mark Henry (Warehouse Manager), whose attention to the lengthy period of time Stanley had already been on the phone by a lead person, approached Stanley when he got off the phone. Mark Henry inquired if Stanley had received permission to use the phone and remind him of our policy. Stanley's reaction and behavior were totally inappropriate, disruptive, and argumentative, very nearly approaching insubordination. (See attached.) [The "attached" is a copy of RX 21, Henry's five-page file memo of 6–25–97; 6:1105.] Stanley was suspended without pay beginning at approximately 11:45 a.m. 6/25/97 until an investigation of the incident could be completed. The investigation was completed yesterday with the interview of Rodney Jackson whose name was provided by Stanley Jones .
>
> *WHAT DOES THE COMPANY EXPECT:* Associates to abide by all company policies and procedures without exception, not to waste time while on the time clock, to address supervisors and those in a lead person['s] position in a responsible & respectful manner and tone of voice, and to carry out directives by supervision and lead persons without hesitation or disrespectful comments.
>
> The inappropriate behavior and comments made by Stanley Jones were counter productive and will not be tolerated. Mr. Jones' tone of voice, aggressive and threatening behavior, refusal to follow Mr. Henry's instructions and to answer his questions warrant termination. Mr. Henry has recommended against termination favoring to give Mr. Jones a final opportunity to correct what has been a series of documented and undocumented instances of threatening, insulting, accusatory and insolent behavior.
>
> *FUTURE ACTION:* Any violation of policy, procedure, outburst of disrespect or acts of insubordination toward a supervisor or lead person who are [is] discharging their [his] job duties may lead to termination of employment.
>
> Mr. Jones, you are on a Final Notice. We expect an immediate and sustained change in your responsiveness to authority and directions from authority.

Jones declined to sign his acknowledgement of receipt of the warning, testifying that he told them he did not want to sign it. Gaither gave him a copy of the warning. Jones reported for work the next morning at 6 a.m. (2:209; 5:775–776).

(2) Discussion

Jones denies telling Warehouse Manager Henry, on June 25, "Don't do it" and "Get out of my face." (2:201, 219; 7:1339). While I credit Henry and his version (not only because of demeanor, but because Henry's version is more logical and inter-

nally consistent), I note that even under his own version Jones turned away from Henry while telling Henry, the warehouse manager (three levels up the organizational ladder from Jones), that "I don't want to listen to any more of this." (2:200; 5:766). Thus, even under his own version Jones was insubordinate.

The General Counsel's argument (Brief at 37) that Jones' reaction was "unlawfully provoked" is misplaced. Jones refused to answer a simple question. If Jones really respected authority, as he claims, he would have answered the question and, in a calm and respectful manner, looked for his opportunity to pose any questions he had. [If Jones suspected that he was about to be harassed, he should have answered Henry's question and let the event unfold so that any harassment would be demonstrated. Rather than thinking, Jones responded with his own harassment of the warehouse manager. Jones' predicament was self-imposed.] The General Counsel (Brief at 17) observes that Aldridge's notes (GCXs 66, 67) make no mention of the length of Jones time on the call. Aldridge was more concerned about Jones' reported conduct toward Warehouse Manager Henry. In any event, Henry's notes (RX 21) mention the lengthy time on the telephone, as does the final warning (GCX 16). The lengthy time on the telephone merely attracted Henry's attention. What brought about the suspension and final warning was Jones' insubordinate and disrespectful conduct toward Henry.

The critical fact is that the General Counsel has shown no disparity. There is no evidence that, before this incident, Warehouse Manager Henry (the manager who initiated the action) had ever disregarded notice that an employee was abusing [anywhere near the 18 or more minutes that Jones was on the telephone] the informal 1-2 minutes he and his warehouse supervisors have permitted employees to make telephone calls during working time. Forklift driver Annette Bland tells us exactly how she [and doubtlessly nearly all other employees] understood her time limit under the informal discretion for calls during working time—conclude any call within the 3 minutes stated in the sign. Asked if she thought that she could talk as long as she needed to, Bland shows how she, and virtually all other employees used their common sense on calls during work time (3:346): "No, I just go make sure my daughter had got home from school and that was it."

Even under Jones' version, his 5 minutes on the telephone exceeded the 3 minutes that employees are instructed, by posted sign, to limit their calls even when on breaks. And under his own version, Jones' purpose in making the call was simply to inform his wife that he would not have to work overtime, and to learn when she would finish work for the day—a message that, aside from any holding time, would hardly have required more than a minute. Clearly, Jones abused the informal slack that Warehouse Manager Henry was cutting for employees. If this slack was thereafter restricted, the employees must blame Stanley Jones, not Warehouse Manager Mark Henry.

The General Counsel also argues, as an additional factor indicating unlawfulness, Fleming's "open hostility toward unionization." The General Counsel does not pause to cite the items relied on by the Government for this position. Presumably, however, she at least relies on the June 3, 1997 closure threat made by Russ Hill, and Gaither's March 19 bulletin board threat to Jones. [Gaither's threat was a "technical" violation of no animus as shown by the fact that Jones, as he concedes (5:785), continued to put union literature in the break-room with no problem, although presumably not on the bulletin board there.]. Whatever it is that the Government relies on does not supply the connection needed here, and that connecting link is disparity. "Timing," also argued by the General Counsel, does not bridge the gap because "timing" here is more consistent with lawful action (rather than in retaliation for Jones' union activity which had openly existed for several months) because Henry reacted spontaneously to an event he personally observed.

Under all the circumstances I find that the Government has failed to establish, prima facie, that Fleming was unlawfully motivated when it suspended Stanley Jones on June 25, 1997 pending an investigation of the telephone incident. [I therefore need not reach the question of whether, had an unlawful motive been established, what effect that would have on the July 2, 1997 final warning which the complaint does not attack.] I shall dismiss complaint paragraph 16.

c. Discharged September 18, 1997

(1) Introduction

Complaint paragraph 19 alleges that Fleming discharged Stanley Jones about September 18, 1997. Fleming admits. The complaint also alleges that Fleming violated Section 8(a)(3) of the Act when it discharged Jones. Fleming denies.

So far as the record shows, Jones had no problems the rest of the summer after his July 3 return to work following his suspension and final warning. Then the events of Thursday, September 18, 1997 unfolded. As with the June 25 telephone incident, at the beginning the incident here was entirely within the control of Jones. With the telephone incident, all Jones needed to do was to answer a simple question. Here all Jones had to do, at the request of Leadperson Bobby Marston, was to reposition some freight. As in the telephone incident, instead of complying on a minor matter, Jones began to argue. When Jones persisted in arguing, Leadperson Marston turned the situation over to management. That resulted in the September 18 discharge of Jones. In effect, Stanley Jones fired himself.

(2) Facts

The morning of September 18 Jones unloaded some freight in Rodney Jackson's section. Jackson is a stocker. The freight, or most of it, belonged in an adjoining section, that of Bruce Bentley. Jackson testified that he asked Jones to move the freight to the adjacent area where it belonged. Jones asserted that he had put it in the correct spot. At that point Jackson contacted his leadperson, Mitch Zweig. The next that Jackson heard, Jones had been fired. (3:435–436, 441–443, 447). The spot where Jones should have unloaded the boxes, Jackson informs us, was about 25 feet away. It would not have required more than 30 seconds for Jones to have moved the merchandise, Jackson advises. (3:449–450). When Zweig came and inspected the area, he told Jackson he would submit a note to Leadperson Bobby Marston so that Marston could direct Jones to reposition the freight. (3:443).

Zweig confirms, testifying that he wrote down the numbers of the boxes and gave the numbers to Marston. (7:1251). Marston advises that Zweig brought the list (GCX 30 at 7) to him about 11:25 a.m., some 5 minutes before the lunch period of the forklift drivers, and informed Marston that some merchandise had been unloaded incorrectly by Stanley Jones, and that Rodney Jackson had called Zweig. (6:1056–1057). During the ensuing lunch period, Marston took the list and personally checked the area. He determined that the freight should have been deposited in Stocker Bruce Bentley's section, which adjoins Jackson's. (6:1057–1060). Marston pulled a copy of the stocker and forklift breakdown areas (GCX 30 at 13; RX 20 at 1) and, at 12 noon, called Stanley Jones into the Receiving Office for a conference (6:1060, 1089).

[GCX 30 at 13 and RX 20 at 1 is each the first page of a June 25, 1997 memo from Zweig, Marston, Strait, and Henry to the stockers and forklift operators describing their areas of function and outlining their duties. The two-page memo served as a basis of a meeting held with the respective groups by Zweig and Marston. Zweig attended when Marston met with the forklift drivers, including Stanley Jones. (6:1062–1064, 1085). Page 2 of the memo, which appears as page 2 of RX 20 (6:1067–1068), is a list of 14 numbered instructions, or rules, for the drivers. Rule 3 provides, in part: "If the freight will not go in the area [where] it belongs, check with the stocker, lead person, or supervisor before using that area's bulk reserve aisle." Rule 14 provides: "If there are any questions or you cannot put the freight in its designated area, contact Bobby Marston or Mitch Zweig." (6:1065).]

Even assuming that Jones sincerely believed that he had unloaded the freight in an appropriate spot, he concedes that Jackson, the stocker for that section, was upset that Jones had placed the boxes there when most of them belonged in Bruce Bentley's section. When Jones refused to move the load as Jackson requested, Jackson "cursed" Jones, and told Jones that Jones was "too damned ignorant and stupid and can't nobody talk to you." (2:222–223; 5:804–806). Clearly, the rules of June 25 applied, and Jones should have called his leadperson, Bobby Marston.

Once Jones arrived in the Receiving Office, Marston began to tell Jones why Marston had called him in. As soon as Marston spoke the phrase "put up wrong," Jones interrupted with, "What do you mean, I put up wrong?" This was repeated and Jones defended himself on the basis there had been no room there. "I don't buy that," Marston said, because Marston had gone back and checked. "I don't care what you buy," Jones told Marston. Marston mentioned the [June 25] meeting and the rules, and that Jones should have come and gotten Marston. After trying three times to get to the point of explaining where the areas separated, with Jones interrupting in a loud and agitated fashion, Marston gave up and told Jones to follow him to the office of Warehouse Comanager Dennis Strait. At that point Marston intended to let Strait handle the matter. Marston's purpose in calling in Jones was not for discipline (because he has no authority for that), but simply to explain to Jones why the freight was in the wrong place and to ask Jones to move it. (6:1060–1062, 1074–1076, 1086, 1100–1101).

Unknown to Marston, Jones was tape recording their conversation. The tape is in evidence (GCX 36 side 1, 5th conversation; GCX 60) as is a transcript (GCX 37 Jones version; RX 22 Marston's modified version). The differences in the transcript versions are mostly minor. The transcript supports Marston's account. While the tape shows that Jones was argumentative, Jones does not become loud until shortly before Marston, exasperated, raises his own voice, and soon thereafter Marston tells Jones to accompany him to see Dennis Strait. The transcript (both versions) shows that the final item triggering Marston's decision that they take the matter to Strait was Jones' question, "Why do I need to come get you?" The tape shows that the tone of Jones' question (which is followed by a part of a statement before Marston abruptly interrupt with the directive to accompany him to Strait) to have been defiant, sarcastic, and dismissive toward Leadperson Marston.

As the transcript (both versions) and tape reflect, Marston began in a calm and nonaccusatory tone—"We've got them in the wrong area." "What do you mean about the wrong area, I mean ..." Jones interrupts. "I'm going to explain it to you," Marston replies. Marston then starts to explain.

After just a few words, Jones begins to interrupt again, and Marston says, "Well, let me finish because I checked and this is wrong. I'm gonna tell ya they're wrong. I looked at 'em. So if it's in 1700, it's Bruce's area, it needs to be at that end, not down toward Rodney's end." [The foregoing quote, which I find to be correct, is from my listening to the tape. It differs a bit from the other two.] Jones then asks, "Okay, what if that area was crowded?" "But it's not," Marston states [without interrupting, as editorially added in the Government's version]. Marston continues, "I went back and looked." After Marston makes his "But it's not" statement and begins his "I went back . . ." sentence, Jones also begins his stammered response to the "But it's not" by saying that it may not be crowded now but it was then. Before Jones finishes this, Marston can be heard on the tape saying, "No, no" and, as the transcript reflects, "I won't even buy that," followed by Jones' interruption of, "Well, whatever you buy—you know—I mean."

Although both transcript versions show Jones as stating, "You don't have to buy it," that is not confirmed by the tape. I find that Jones did not say it. Even so, the "Whatever you buy" phrase clearly is disrespectful, and certainly in tone, but it falls a bit short of the insubordinate, "You don't have to buy it." However, an initial playing of the tape can give the impression that such is what Jones said. As noted above, both transcript versions so record it. Moreover, in the four-page account (GCX 19; GCX 30 at 3) which he wrote (6:1055–1056) later that September 18, Marston shows that he understood Jones to say, "I don't care what you buy." (GCX 19 at 2; rendered in third person in the account.). Accordingly, although, as I have found, Jones did not actually say "I don't care what you buy," I further find that Leadperson Marston reasonably understood Jones as uttering those words.

The next exchange, as the transcript reflects, has Marston telling Jones not even to go back and check the area because Marston has done so and there in plenty of room for the product in the adjoining section of Bruce [Bentley]. To Marston's statement about "more than enough room" in the proper sec-

tion, Jones again asserts that at the time there was not enough room. Marston tells Jones that "he then should have come to Marston.

At that point the end begins. Jones, escalating the speed and level of his voice, states: "What do you mean I should have come and got you. I mean, I-I-I'm aware of how—I'm aware of how to do it." To this Marston responds, "But you didn't do it." What do you mean I didn't do it. I mean . . . ." Interrupting, Marston, now himself using a bit higher tone level, asks, "Did you come and get me and tell me that you couldn't get it up?" Overspeaking the last word or two of Marston's, Jones replies, in a raised, agitated, sarcastic, and dismissive tone: "Why do I need to come get you? That would be like . . . ." Interrupting, Marston terminates the meeting at, apparently, his desk in the Receiving Office with: "All right, let's go see Dennis [Strait]. C'mon."

As they start to leave the Receiving Office the conversation continues, with Jones saying, "Back to this old same thing." Marston replies, "Well, that's right. You know what the procedures are and you didn't do it." "What you talking about," Jones responds, starting to continue with "I mean ..." when Marston interrupts by telling him to wait right there, "I'll get them and we'll get this settled. Just right out that door please." Marston can be hear calling on his radio for (Leadperson) Mitch Zweig to come to the Receiving Office.

As the testimony (plus the transcript) explains, Dennis Strait was not in the Distribution Office, or up front, and was apparently at lunch. A lot of testimony, much of it disputed, centers on where Marston, Zweig, and Jones were standing just outside the Distribution Office and whether Jones, during at least part of the conversation, was waving his arms —suggesting that he possibly was losing control. I need not summarize those matters because it is clear that the basis of the discharge was what occurred when Jones met with Marston in the Receiving Office. That is the conduct that caused Leadperson Marston to tell Stanley Jones to accompany him to see Warehouse Comanager Dennis Strait.

However, aside from those disputed facts, which I need not cover, the balance of the transcript (and tape) shows that Jones continued arguing even when he knew that Marston was going to submit the matter to Strait. Jones continues pressing his argument that there had been no room when he unloaded the merchandise. Marston reminds him of the [June 25] meeting in which "we told you guys to come tell us if it was not room ...." Jones breaks in with, "How many doors I got? I got three [warehouse] doors [to cover with his forklift]." "That's not the point. That is not the point," Marston states, continuing, "you were told if you couldn't put it up, come find me or Mitch. That is exactly what we said. You didn't do it."

"Regardless of what was said, I'm not going to argue with you, " Jones states. "What do you mean, 'Regardless'" Marston asks. Quickly shifting away without explaining his "Regardless," Jones asserts that "I'm not going to argue with you." "Well, but you are," Marston observes. "No, I'm not arguing with you," Jones replies. The conversation then begins its conclusion as follows (bold added):

> MARSTON: No, all I wanted you to do was to be aware of where the break was. I was going to ask you to go back and fix it. No, you started, "Why do I have to come and get you." That's not the point. In the meeting you were told that. Just—tell you what, we'll wait. Soon as they come back from lunch, we'll all get together and see what they want to say. I don't know.
>
> JONES: I mean—like—I got three doors.
>
> MARSTON: That doesn't matter.
>
> JONES: I know what you're saying.
>
> MARSTON: But then what is the point?
>
> JONES: What is the point?
>
> MARSTON: Whether you have got three doors or not, you're supposed to follow what the rules were. Plain and simple.
>
> JONES: Call me when you need me, okay?
>
> MARSTON: Don't worry. We will. [Marston's voice is heard as he is departing.]
>
> JONES: You call me when you need me.
>
> MARSTON: Okay [in a receding tone].
>
> JONES: **Get yourself together**.

It is not clear that the receding Marston heard Jones' last insulting dismissal, "Get yourself together." That insubordinate remark, however, vividly shows Jones' attitude. Clearly, Jones considered himself in the right (and the one who was calm and not agitated), and Rodney Jackson and Bobby Marston, and anyone else opposing him, to be in the wrong. It further shows that Jones would be disrespectful even though he was under the burden of a final warning. He would argue with his boss over a matter so minor as to be, in the context of this case, a mystery as to why NLRB Region 26 decided to issue a complaint and to proceed this far as to Stanley Jones. [Fortunately for the Government, this is not an EAJA case.] This is especially so because the Government had in its possession the tape recording of the September 18 incident with Leadperson Marston, and that tape clearly shows the argumentative conduct, to the point of insubordination, of Stanley Jones. As with a certain national figure a quarter century ago, Jones' own tape recording proves to be his undoing. In a sense, he truly is "hoisted by his own petard."

Management collected statements from the participants [other than from Jones who was not interviewed] and others who saw a portion of the events. Foremost among these are the statements of Leadpersons Marston (RX 22; GCX 30 at 3-6, with attachments) and Zweig (GCX 20; GCX 30 at 22–23), with supplementary statements by James Taylor (GCX 30 at 24; 2:176–177), Peggy Cates (GCX 21; GCX 30 at 25), and Danny Gaither (GCX 18; GCX 30 at 26). No statement is attached from Forklift Driver Deborah Grandberry, although she confirms Marston in that portion of the Receiving Office conversation that she heard. (7:1170–1172).

Although Human Resources Manager Gaither states that a consensus decision was reached [that September 18] to discharge Stanley Jones (2:157, 173), Distribution Manager Mark Aldridge asserts (7:1329) that he made the decision. I interpret Aldridge's assertion to mean that, although the group of managers agreed, he was the person officially making the decision

as the top manager of the department involved. The four persons signing (as present at the termination meeting) the separation memo were three managers (Aldridge, Henry, and Gaither) and Leadperson Marston. (GCX 30 at 2).

The text of the memo describing the "Final Incident Leading To Employment Separation Of Stanley Jones From Fleming GMD September 18, 1997" reads (GCX 30 at 1, bold in original):

> It had been brought to Mitch Zweig's (Lead Person Over Stocking) attention that Stanley Jones (Fork Lift operator) had been placing merchandise in the wrong reserve slots. This practice makes a stocker's job more difficult, because the merchandise is located out of the stocker's area, resulting in a greater potential for lost merchandise and increased circles and outs. Rodney Jackson (Stocker) told Mitch Zweig he had words with Stanley about putting merchandise in the wrong area and wanted Mitch to handle. (This occurred today 9/18/97.)
>
> Mitch Zweig did an inspection of the stocking area, and listed merchandise that was out of the proper reserve. The list consisted of 10 items of which Stanley Jones was directly responsible for seven of the ten items. (See Attachments.)
>
> Mitch Zweig turned the list of merchandise that was improperly reserved over to Bobby Marston (Lead Person Over Receiving). Fork Lift Operators are part of the receiving department.
>
> Bobby Marston took the list and walked to inspect the reserves in question and determined that the list was accurate and there was more than adequate room to have warehoused in the proper reserves. There had been previous meetings with lift operators and the procedures are understood by all. If product cannot go in the proper area, the forklift operator is expected to contact Bobby Marston or Mitch Zweig.
>
> Bobby asked Stanley Jones to come to the receiving office. Bobby Marston's intentions were to explain what he had done wrong and get him to correct it.
>
> **(See the attached notes.)** [The attached notes are the memos of Marston (GCX 19, with the backup production documents attached), Zweig, Taylor, Peggy Cates , and Gaither.] Instead of allowing Bobby Marston to explain, Stanley began to exhibit the same type behavior documented previously and most recently in a **final warning on July 2, 1997.** Stanley's behavior became very disrespectful, argumentative, accusatory and insulting toward his lead person, Bobby Marston. Bobby was simply trying to discharge his assigned duties as a lead person.
>
> **It was made perfectly clear to Stanley Jones on July 2, 1997 by management that [any] future outburst would not be tolerated.**
>
> A meeting was held with Bobby Marston, Mitch Zweig, Mark Aldridge, Danny Gaither, Mark Henry and Russ Hill to review the facts that occurred. The decision was made to separate employment.

Later that afternoon Jones was called into Aldridge's office. Present were Jones, Aldridge, and Gaither. The meeting [tape recorded by Jones, with tape and transcript in evidence as GCX 36, side 2, and GCX 37 at 3] was one paragraph long. After reminding Jones of the final warning that had issued to Jones earlier, and what was expected of him under that final warning, Aldridge said that in the situation that had arisen that September 18 that Jones had refused to comply with the final warning. Jones was terminated, and Gaither gave him his separation notice. The text of the separation notice states (GCX 17):

> After previous documentations, including a Final Warning for being argumentative with supervision, Stanley exhibited the very same behavior today toward his lead person.

Gaither testified, similar to the separation notice, that the basis for the discharge was twofold: (1) the fact of the final warning of July 2, 1997, and (2) a repetition of that anti-authority attitude and behavior. "On July 2 we made it perfectly clear that we would not tolerate that type behavior and that we—in that particular documentation we told him that we really should have fired him then, but because of his tenure and so forth we wanted to give him a second chance. Then he exhibited the same type behavior the second time." (2:172–173). Warehouse Manager Mark Henry and Leadperson Bobby Marston escorted Stanley Jones out of the building (with Jones stopping at nearly every public address station to announce his discharge). (6:1081–1082, 1095–1096).

(3) Discussion

For someone laboring under a "Final Warning," Stanley Jones foolishly engaged in the same argumentative behavior less than 2 months later, on September 18. Even if Jones had some rational basis for his decision to unload the boxes where he did, he contends that the area was congested, admits that the stocker did not want another stocker's merchandise in his area, and he knew the rules of June 25—in a situation such as this, call the leadperson to resolve the problem. Jones asserts that there was no problem. Jones' problem is that he sees things only one way—his way—and he acts strictly according to that personal view of his business world. All who have a different view are wrong, even if they are his superiors. As they are his superiors, Jones therefore sets out to persuade them to his view by arguing even over the most minor of work instructions—such as to take all of 30 seconds to use his forklift to move some boxes about 25 feet. [Actually, Marston never reached the point of giving that instruction, but from Rodney Jackson, the stocker, we know that is what was involved and could have been done on the spot without ever getting leadpersons or management involved.] Sadly, as mentioned earlier, Jones never learned the common-sense wisdom of the old saying, "The boss may not a lways be right, but he is always the boss."

Jones attitude of "I'm right and you're wrong" led him to react in an argumentative fashion when Leadperson Marston, in a nonaccusatory fashion and tone—"We've got them in the wrong area."—[That's "we" as in "you and I."] tried to explain the problem and to have Jones go move the boxes. By immediately reacting defensively and argumentatively, while under a final warning to avoid such conduct, in reality Stanley Jones fired himself. If Jones was not amenable to following the old common sense saying, mentioned earlier, that the boss is al-

ways the boss, then he would have served himself well had he followed the wisdom of Qoheleth, an inspired writer, who teaches that there is a season for everything, including "a time to be silent, and a time to speak." *Ecclesiastes* 3:7.

Apparently attempting to show some disparity, the General Counsel points to an "interview" as the only discipline administered to one James Bolton for having been insubordinate to Leadperson Zweig in early June 1997 (GCX 22). Although Gaither asserts that it was the first time Bolton had exhibited that behavior, whereas Jones previously had exhibited this behavior more than once and had been given a final warning (2:156), Bolton's interview document (GCX 22) states on its face that Bolton had been disrespectful in the past. However, the exhibit shows that Bolton was warned that any such conduct in the future would result in "stronger disciplinary measures." Bolton was just not as far along the disciplinary trail as was Jones. No disparity is shown.

Lastly, the General Counsel (Brief at 39) argues that Fleming's unlawful motivation is disclosed by the fact that it did not interview Stanley Jones and obtain his version of events. There is no question that, in the right circumstances, such a failure can be an indicium of unlawful motivation. The circumstances here do not fit that category. Fleming cannot be faulted for relying on the reports it received, particularly that from Leadperson Bobby Marston. And Jones' own tape recording clearly demonstrates that Fleming was well justified in discharging Stanley Jones. Stated differently, I find that the Government failed to prove prima facie, by a preponderance of the evidence, that a moving reason for its September 18, 1994 decision to discharge Stanley Jones was his activities on behalf of the Union. Accordingly, I shall dismiss complaint paragraph 19.

2. Richard Campbell

a. Introduction

Complaint paragraph 18 alleges that about August 25, 1997 Fleming issued a disciplinary warning to Richard Campbell. Fleming admits. The complaint also alleges that Fleming violated Section 8(a)(3) of the Act by issuing the warning to Campbell. Fleming denies. Richard Campbell testified in support of the allegation, with Leadperson Mitch Zweig testifying in opposition and identifying the warning—GCX 12; RX 38. Distribution Manager Mark Aldridge identified (7:1321–1323) an earlier (June 11, 1997) written warning (RX 1) issued to Campbell by Aldridge for similar poor performance, but apparently not as extensive as the alleged incident of August 11, 1997.

Campbell is a long time employee at the facility, having begun working there over 20 years ago (as of the trial). (4:551). Since about October 1996 Campbell has been a stocker reporting, since about January 1997, to Leadperson Mitch Zweig. (4:551, 606–607). Before that he worked (several years, apparently) as an unloader. (4:552).

Fleming's annual appraisals of Campbell's work performance are in evidence beginning with the review year ending March 1993 (GCX 39) and ending with the review period concluding March 1997 (GCX 43). Through those years Campbell's overall ratings have been "partially Met Objectives" [Malone & Hyde form] or "Inconsistent" [Fleming form] in 1992–1993 (GCX 39; supervisor D. Purcell), 1994–1995 (GCX 40, supervisor Doug Sanders), and 1995–1996 (GCX 42, supervisor Shirley Martin), and "Met Objective" [Malone & Hyde form], or "Accomplished" [Fleming form], for 1993–1994 (GCX 41, supervisor Shirley Martin) and 1996–1997 (GCX 43, by supervisor Dennis Strait). His marks for Quality, Job Requirements, and Initiative [the most relevant categories here] have been mixed, with the exception of Job Requirements. For that category he received good marks until the review by Dennis Strait who gave him "Inconsistent." The latest review, by Warehouse Manager Dennis Strait, gives a good mark ("Accomplished") for Quality and "Inconsistent" for Initiative. (GCX 43).

In March 1997 Strait wrote, in part, "Richard is a valued associate that [who] has been with the company for twenty years. He reports to work consistently and on time. Richard does quality work. However, he needs to work on his knowledge of job requirements." For summary Strait wrote (GCX 43):

> Richard can be counted on to get the job done and has a good attitude. He needs to work on his initiative towards teamwork, but overall Richard is an accomplished associate that [who] is a true help to the stocking department.

Respecting disciplinary problems, after a couple of matters in 1993 (an interview and a written warning in 1993 for talking too much to stockers, noted in the 1993 to 1994 review, GCX 41), nothing appears until, as discussed earlier, the February 5, 1997 "interview" (GCX 6) which he and Vessie Reynolds received for spending excessive time in the breakroom after clocking in.

The next item of evidence, in time sequence, is a May 27 memo (GCX 27) from Human Resources Manager Danny Gaither to "Distribution Management & Team Leaders" respecting "Group Talks" on May 28 and May 29. Two attached pages list the names of some 118 employees (including leadpersons such as Zweig and Marston) scheduled to attend, at different hours, the "Antiunion Save Fleming Meetings." The third attached page, having 19 numbered names, bears the heading, "There Will Be No Meeting Scheduled For The Hardened Hearts And Minds." (GCX 27 at 4). Of the 19 names on the list (including that of Stanley Jones), the first name is that of Richard Campbell. Rodney Jackson is listed in second place. Gaither testified that he created and typed the list. (1:127; 2:146). The 19 are so listed, and excluded from the "antiunion" [many employers use the more positive term of "procompany"] "Save Fleming" captive-audience meetings (Gaither's memo refers to a film to be shown) because, Gaither testified, they had been "disruptive" at previous meetings and it was obvious that, as Fleming could not change their minds, any required attendance would waste their time and Fleming's. (1:126; 2:148).

It was not intended, Gaither testified, that copies of the memo and lists reach anyone besides management and team leaders. (1:127; 2:146). The term "disruption," Gaither asserts, includes actions showing disinterest—such as sleeping during a film, or arguing rather than listening. Richard Campbell is one of those showing disinterest. (2:147, Gaither). The 19 includes employees who visibly supported the Union by, for example,

wearing Union insignia. (1:126–128; 2:146). The General Counsel offered this document to show union animus respecting the alleged discriminatees among the 19 named on the fourth page. (1:116). I received the document because it names the alleged discriminatees, and not because it necessarily shown any union animus. (1:129). I rejected three other documents (GCX 26, 28, & 29) in which Gaither expresses his opinion opposing the Union, because Gaither's expressions of opposition to the Union, in my view, are protected by 29 USC 158(c) and express no animus. (1:120, 122–123). That is different from ruling that if expressions are protected by Section 8(c) they cannot be used to show animus, the position taken by the courts—see *Medeco Sec. Locks v. NLRB*, 142 F.3d 733, 744 (4th Cir. 1998), and *BE&K Const. Co. v. NLRB*, 133 F.3d 1372, 1375–1376 (11th Cir. 1997). The Board's view is otherwise. See *Stoody Co.*, 312 NLRB 1171, 1182 (1993). Although I am bound to follow established Board law,[10] my ruling does not reach the conflict between the Board and the courts because I simply find no animus expressed.

Turn now to the document at hand—Gaither's four-page May 27 memo (GCX 27), especially the fourth page listing the 19 excluded from the meetings because they have "Hardened Hearts And Minds." First, I attach no significance to the sequential order of the names. Richard Campbell may be listed first because Gaither possibly started with the stockers. (Recall that Rodney Jackson, in second place, is a stocker.)

On brief the General Counsel does not argue that the listing and exclusion, either singly or in combination, constitutes animus. Apparently, therefore, the General Counsel has abandoned the position of animus the Government took at trial. Agreeing with the Government's apparently new position of no animus, I likewise find no animus. Excluding open supporters of a union from the employer's captive-audience meetings, where the employer's views opposing unionization are expressed, is not unlawful. (And the complaint here does not attack the exclusion.)

Similarly, as the reasons (disruptive or showing disinterest) described by Gaither for excluding the 19 are union-neutral, no animus is shown simply because many of them wore union insignia.

Moving on now to the next event, I note that Distribution Manager Mark Aldridge himself issued a written warning (RX 1) to Campbell on June 11, 1997 for poor performance. The text of Aldridge's handwritten note attached to the warning form states (4:610; 7:1321):

> CIRCUMSTANCES:
>
> The inventory preplanning in Richard's area was not completed causing over 300 pallet tags to be written in. Richard's area covers the 36 and 3700 aisles.
>
> Richard's poor performance in preparing for inventory resulted in several associates working unnecessary overtime Saturday 5–17–97 and Sunday 5–18–97.
>
> **FUTURE ACTION:**
>
> Random inventory checks will be performed by supervision and/or the stocker lead person. It is Richard's responsibility to maintain his work area and to assure his inventory is identified and slotted in the proper location. Failure to do so will result in further disciplinary action up to and including termination.

On cross-examination Campbell expressed a desire to address this matter. (4:610–611). But Fleming asked no further questions about it, and the General Counsel did not do so either during redirect examination. Hence, Campbell never got his chance to "elaborate."

b. Final warning of August 25, 1997

Turn now to the final warning. Campbell was on vacation during part of August 1997. When he returned to work Monday, August 25, he was presented with a "Final Warning" (GCX 12; RX 38) from Dennis Strait and Mitch Zweig for problems allegedly found in his section when he was gone. (4:571). Zweig thinks that Distribution Manager Mark Aldridge also was present at the disciplinary meeting, but he is uncertain. (7:1289). When he later testified, Aldridge did not claim to have been present, although his signature is on the warning.

The events developed in this manner respecting the final warning. Early Monday morning [Monday, August 11, according to the warning form] Zweig received a [radio] call from Strait who was in one of the aisles in Campbell's section. Strait was with Kenny Kimbrell who was filling in for Campbell. Strait said he had noticed some problems in the area. After Strait pointed to some of the problems, Zweig said he would make a check and submit a report. Zweig then took a pad and inspected Campbell's section, making two pages of notes of problems he found. (7:1243; RX 38 at 3–4). After Zweig submitted his report to Strait, Strait told Zweig to prepare a final warning for Campbell and to submit it to Strait. (7:1300). Zweig then prepared the document (RX 38) which consists of the one-page warning form, a second page of 9 listed problems found, 9 items that Campbell must do, and 4 listed items of what the company expects. Pages 3 and 4, as noted, are the notes (mostly box or case numbers) which Zweig recorded during his inspection. Zweig testified that he did the investigation and prepared all four pages of the warning document, except for the signatures. (7:1242, 1288, 1301). Apparently just the first two pages (GCX 12) were given to Campbell.

The nine numbered problems allegedly found are: (1) Excessive build up of cases white tagged behind the slot. (2) Cases keyed to the slot that have not been white tagged. (3) Cases in bottom two reserves without any tags at all. (4) Freight on the floor. (5) White tag cases on third and fourth levels of reserve racks. (6) Excessive cases stacked on the back of the pulling line. (7) Cases in upper reserve racks without any tags. (8) Full pallets of freight in the bottom two reserves. (9) Pallets with partial amounts of cases that did not match the tag.

For its "What Should Be Done, Or How To Fix Them" section the warning states, in nine numbered corresponding items [run-on sentences in items (1) and (5) separated]: (1) Check your replenishment against what you have white tagged behind the slots. If you have freight white tagged behind the slots, zero it out on your replenishment. (2) Put white tags on every

[10] *Waco*, 273 NLRB 746, 749 fn. 14 (1984).

item that will not fit in the slot after you have keyed the pallet tag out to the slot. (3) You are responsible for making sure ALL freight in your area has some kind of tag on it. (4) All freight MUST be on a pallet. (5) All white tagged freight should go on the bottom row behind your slots. Occasionally a few cases might overflow to the second rack but should be moved down as soon as possible. (6) NO CASES should be left on the back of the line at the end of the day. (7) All freight in the upper reserves must have a tag on it. (8) All full pallet freight must be put in the upper three reserves. (9) When pulling your replenishment, pull every case on that layer.

Finally, the second page ends with the section, "What The Company Expects," which reads: (1) All stockers have been trained on what their responsibilities are and what work procedures should be followed. (2) You are responsible for making sure your section is complete each day before you leave. (3) You are expected to keep your section up by following all work procedures, knowing your position description, and by following the white tag program. (4) Communicate any problems or issues to you lead person or supervisor.

Respecting problem number (1), Campbell told Strait, at the warning interview, that, yes, there possibly were some white tagged cases behind the line, but that is where they have to be placed when the slot gets full. As Campbell testified, "If the slot is full then that stays behind the line. The white tag stays behind the line." (4:573, 580–581). Campbell asserts that he disputed number (2) by telling Strait that everything he keyed out he had white tagged. The presence of number (2) is one reason that Campbell did not sign the warning. (4:573). With the exception of numbers (1) and (8), Campbell denies all the others and so told Strait, who made only a few comments before moving to the next section. (4:579–591, 595). As to (8), Campbell explained to Strait that, to avoid his getting behind for fast moving merchandise, Campbell would put whole pallets in the bottom two reserves (which are reserved solely for use by the stockers) for quick access during his shift. Strait did not agree to Campbell's system. Campbell acknowledged the possibility that he was guilty of leaving some of that there when he left on vacation. (4:595–597). As to the other matters in the last two sections of page 2 of the warning, Campbell testified that he told Strait he followed those to the letter. Strait had no comment. Campbell refused to sign the warning because, he told Strait, he did not feel he was guilty of most of the problems listed. (4:591–594).

Zweig testified that Campbell's last day before his vacation started was the Friday before (7:1242, 1247) and that there were no weekend stockers (7:1242) because no one works at the facility on weekends (7:1247). "It would have taken weeks for some of that to build up," Zweig asserts. (7:1247). The only specific item Zweig describes (7:1247) in this connection is the "excessive freight behind the line," or alleged problem (1). As noted, Campbell admits to the existence of some of that, but credibly testified that such is what happens when the slot fills up. When the slot fills up, standard procedure is to place it behind the line.

Most of the 9 "problems found" Campbell disclaims as being caused by anything he did or failed to do. Instead, Campbell observes that other employees, such as forklift operators and order selectors, have access to the section and frequently knock over boxes or pull the one case that is white tagged from a pallet, leaving the other boxes on that pallet without any white tag, and forklift drivers depositing merchandise in the racks but failing to enter the pallet numbers into the computer. (4:575–579) Lift driver and former stocker Annette Bland agrees (2:276) as does stocker Vessie Reynolds (3:498–500). Moreover, while stockers usually leave at 2:30 p.m., order selectors (2:276; 7:1288) work until about 6 p.m.

A question exists here regarding the date when Campbell began his vacation. No witness specifies the date. Zweig implies that the first business day of Campbell's vacation was the same Monday—August 11—that is mentioned in the final warning document. This would be the same Monday that Strait called Zweig to Campbell's section, followed by Zweig's inspection, and then Zweig's preparation of the warning. As noted, Zweig testified that Campbell's last day before his vacation began was the Friday "before" the Monday (August 11) that Strait called Zweig over to Campbell's section. (7:1242, 1247). That is to say, Campbell's last day at work was Friday, August 8.[11] And, Zweig testified (7:1247), no one works on weekends at the facility. In other words, as no other employee worked between the time Campbell worked and the Monday morning when Warehouse Manager Strait found these problems and called Zweig, and particularly because it would have taken several weeks for some of the problems to have developed, Campbell is the person responsible for the mess.

Zweig concedes that he tries to make a "quick sight check" of his 23 sections, including Campbell's, once a week, but sometimes he does not have time to give each section a good check. Generally, Zweig acknowledges, Campbell's section has been "fairly straight." Zweig has no idea what could have caused this situation to develop in Campbell's section. Indeed, "That's why I was actually shocked when Dennis [Strait] called me down there to see the amount of problems that there was [were]." (7:1247–1248). Actually, Campbell thinks, but does not know, that Zweig made a daily check of his section. In any event, about once a week Zweig would informally call Campbell's attention to a minor matter that needed to be corrected, "Maybe a little piece of paper hanging off the boxes or something like that." (4:568–570).

Zweig testified that the order selectors could not have created the problems in racks high above the floor because they do not operate forklifts or other lift machines. (7:1243, 1246). [However, forklift drivers have that equipment, and the order selectors, as Bland Reynolds describe, come in and sometimes pull (from the bottom rack) the one box that is white tagged, thereby creating an inventory discrepancy.] Fleming introduced copies of warnings issued for similar problems of stockers during 1997. (RXs 16, 17, 33–35).

[11] Although the General Counsel (Brief at 20) asserts that Campbell returned on August 25 from a 1-week vacation, the evidence indicates that Campbell had taken a vacation of 2 weeks. The point is immaterial in the absence of a contention that Fleming backdated the date of the inspection by a week or so, thus allowing other employees to enter and leave a mess in Campbell's section.

c. Discussion

Fleming attacks the credibility of Richard Campbell based, in part, on an asserted contradiction between his testimony at trial and in a pretrial affidavit respecting when he began his first union activity. As Campbell credibly explains at trial, the initial reference to card signing referred to activity by union supporters generally. He later (about late January to early February 1997; 4:553, 621) began wearing union insignia and still later, in March (4:621) he began asking employees to sign cards. (4:552–553, 618–623).

The initial question now is whether the Government prima facie established a violation. Presumably Zweig or supervision observed Campbell wearing his union insignia. Zweig testified that Campbell was not wearing any union insignia when the February 5 warning was issued to him. (7:1228). That was because, I find, Campbell had not yet begun wearing the insignia. Thereafter he did, and Fleming, I find, observed such activity. Campbell, I find, was one of the known union supporters whose names appear on the May 27 list (GCX 27 at 4) of the "Hardened Hearts And Minds." Knowledge is established. Animus is not shown, however. There is no direct evidence of animus toward Campbell, and I infer no animus from the mere fact that Richard Campbell was one of the 19 on the "Hardened Hearts And Minds" list who were excluded from Fleming's antiunion "Save Fleming" meetings. Nor is any disparity shown.

The General Counsel apparently attempts to argue pretext [in the sense of a gross distortion of conditions, or by even outright lies about the conditions] by contending that, as Campbell asserts, his section was in proper shape when he left for vacation Friday afternoon, August 8. By referring to an "alleged" inspection (Brief at 20), the General Counsel apparently suggests that either Strait or Zweig made no inspection and, as no weight was given to the fact that order selectors, late stockers, and forklift operators come into a stocker's section and leave things misplaced, pretext is shown (Brief at 38). The Government conveniently fails to address the evidence that no one worked between late Friday, August 8, and when Strait allegedly found the mess on Monday morning, August 11. That means, under the Government's argument, that all of the mess, or most of it, was created in the 3 hours or so after Campbell's 2:30 p.m. departure on vacation that Friday, August 8.

For its part, Fleming argues that even if it be determined that Campbell was not responsible for the deficiencies found, Fleming held a reasonable (and unrebutted) belief that Campbell was responsible and that the discipline imposed was not unlawful. (Brief at 54–56).

At trial the Government did not seek to demonstrate, and on brief does not argue, that the alleged deficiencies were "planted" by management, or at management's direction, over the weekend of August 9–10, 1997. "Planted" evidence has occurred in other cases, including at least two of mine. See, for example, *Acme Die Casting*, 309 NLRB 1085, 1152–1153 (1992) (supervisor falsified employee's production rates), enfd. except remanded as to unrelated issue, 26 F.3d 1162 (D.C. Cir. 1994); and *Southwest Distributing Co.*, 301 NLRB 954, 980–984 (1991) (stale "throwdown" beer planted on driver's route).

The courts and the Board are quite alert to the technique of an employer's "laundering" a "bad" motive by passing the decision, on planted evidence, to a third manager outside the conspiracy loop. This is so, as the courts have phrased it, to prevent a company from "laundering" a "bad" motive by passing the decision, on planted evidence, to a third manager outside the conspiracy loop. See *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117 2751–2752 (6th Cir. 1987), citing and quoting from *Boston Mutual Life Insurance Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982). While that is somewhat different from the potential situation here (Zweig, while not the decision maker, was the investigator of possibly planted evidence, with Zweig being outside the loop), the effect would be the same analytically—an unlawful motivation and planted evidence could have been insulated by assigning the investigation to an agent (Leadperson Zweig) who is outside the conspiracy loop.

Here there is a rather strong odor of planted evidence. Leadperson Zweig, I find, was outside of any conspiracy loop. What Zweig asserts that he found he apparently found. But management could well have planted the conditions over the weekend, deliberately leaving Zweig out of the conspiracy so that Zweig honestly could testify that he saw the bad conditions in Campbell's section. [How and when they were placed there is something else.] Warehouse Manager Dennis Strait—the manager who allegedly "found" the initial portion of the alleged deficiencies—conveniently did not testify. Thus, Strait did not assume the legal burdens associated with testifying under oath, nor did he subject himself to cross examination. By not testifying, Strait did not have to answers questions probing into any knowledge he may have had concerning whether the deficient conditions had been moved from somewhere else to Campbell's section over the weekend after Campbell had left on vacation.

To sum up, Dennis Strait did not testify, and therefore did not have to answer any questions. Leadperson Zweig testified that he was "shocked" at the extensive deficiencies (with some of the cases behind the line being of ancient vintage). Zweig was "shocked" because he knows that Campbell's section is usually "fairly straight" and because Zweig (as Campbell verifies) checks the section weekly (perhaps even more frequently). There is an element of overreaching respecting items 1 and 8, the items which Campbell admits some possible presence. As to item 1, Campbell was following standard procedure when there is no room in the slot. Respecting item 8, to the extent there were any full pallets there, Campbell explained that it was part of his effort to be efficient and to move the merchandise without delay. Even if Fleming did not like Campbell's innovative idea, a final warning for such innovation [rather than an "A" for misguided effort] smacks of overkill. These factors are combined with knowledge of Campbell's sympathies favoring the Union and with his credible testimony that he left the section in proper order (with the possible exception of items 1 and 8). Finally, no evidence actually contradicts Campbell. That is, Zweig did not testify that the items he found had been there the Friday before. Granted, he testified that some of the items could have taken weeks to have built up (the items behind the line), but that is different from testifying that those same items

were there, and not someplace else, on Friday, August 8. No one from Fleming with personal knowledge identified this merchandise as having been there on Friday, August 8, when Campbell left for vacation. All this could lead to a finding of unlawful motivation.

Opposed to the theory of "planted" deficiencies are these factors. First, Campbell admits that he "possibly" was guilty of deficiencies 1 and 8. As seen from the earlier quotation of those items, they are not minor items such as "Maybe a little piece of paper hanging off boxes or something like that." [On the other hand, if these are so major, it would seem that Zweig would have seen them, especially since they would have been at eye level, not in the racks high off the floor.] Second, Campbell's performance record leaves doubt concerning his performance on matters such as these deficiencies. It would be one thing if Campbell had a sterling job performance record. The odor of planted evidence would be an overpowering stench had Campbell received high marks in the past in the areas affecting quality, job knowledge, initiative, and job performance. Moreover, the warning issued by Distribution Manager Mark Aldridge in June certainly lends some credibility to the possibility that, indeed, Richard Campbell (although sincerely thinking that he had left his area clean) somehow overlooked the mess which Mitch Zweig noted in the inspection he made on August 11, 1997.

Based on the foregoing considerations, I find that the evidence falls just short of showing a violation as alleged, either under any theory advanced by the General Counsel, or under a theory of "planted" (that is, fraudulent) deficiencies. Accordingly, I shall dismiss complaint paragraph 18.

3. Vessie Reynolds

a. Introduction

On August 25, 1997 Fleming issued a written warning (GCX 11; RX 7) to Vessie Reynolds. [Complaint paragraph 7(a).] Fleming issued Reynolds a final warning (GCX 13; RX 3)[12] on November 26, 1977. [Complaint paragraph 17(b).] By such warnings, the complaint alleges, Fleming violated Section 8(a)(3) of the Act. Admitting the warnings, Fleming denies that it violated the Act by imposing such discipline on Reynolds.

Hired June 18, 1984 (GCX 49–51), Reynolds had worked at the Memphis warehouse for nearly 14 years (3:455) when she first took the witness chair in this case. Since about 1992 she has been a stocker. (3:466; GCX 49 at 1). Before that she worked as an order selector. (GCX 49 at 1). For the past 3 years or so Reynolds has worked the 6 a.m. to 2:30 p.m. shift (3:455, 497) that, apparently, most stockers work. Although 2:30 p.m. is the normal closing time for her shift, stockers are expected to work later if such is needed to complete the day's work. (6:913, 1041, 1051, Sanders; 7:1233, 1280, Zweig).

Four annual performance reviews of Reynolds are in evidence (GCXs 49–52) covering her review years ending June 1993, 1994, 1995, 1996. Such reviews are of limited value for indicating how an employee performed during the relevant period, particularly where, as with Reynolds, the employee was not rated as falling at either end of the spectrum. Nevertheless, the reviews are in evidence.

Dwaine L. Hooker did the first appraisal (GCX 49), Doug Sanders the second (GCX 50) and third (GCX 51), and Shirley Martin the fourth (GCX 52). Hooker gave Reynolds mostly good marks (but only partially good marks for Initiative and Safety). Reynolds favorably impressed Sanders their first year, for he gave her good marks in 8 of the 10 categories, and the exceptions were top marks for Quantity and Safety (GCX 50). For the appraisal year ending in June 1995, however, Sanders dropped Reynolds a bit, with only Safety receiving the highest mark and Attendance, with 46 absences, given the bottom mark of "Unsatisfactory." (GCX 51). Martin states in her review 1996 review that she has been supervising Reynolds for "a very short time." She gave Reynolds good marks in everything except Attendance, which again gets the bottom mark because of 28 absences. (GCX 52). The June 1997 appraisal, if such exists, is not in evidence.

There is an additional appraisal of sorts dated in 1996. This is Gaither's April 4, 1996 "To Whom It May Concern" letter. Gaither testified that it was accurate "at that time" because there was nothing in her file to indicate otherwise. (2:170). The letter's text reads (GCX 32):

> Vessie Reynolds, social security number [number listed], has been employed as a full time associate with our company since June 18, 1984. Vessie began as an order selector and currently serves as a stocker.
>
> Vessie does good quality work [and] maintains productivity standards, is fork lift certified and works well with her coworkers.
>
> Vessie has expressed a desire to explore other employment opportunities. I would recommend Vessie for any position you feel she qualifies.

As discussed earlier respecting the warning of February 5, 1997 (GCX 5) over the breakroom incident, in mid-January 1997 Mitch Zweig became, at the time, the announced supervisor for stockers. Before the election of June 4, management made it clear that Zweig's title was Leadperson. As of a Fleming organizational chart dated April 21, 1997 (GCX 2 at 3), Zweig reported to Warehouse Managers Dennis Strait and Mark Henry. Although it appears that Zweig primarily reports to Strait (2:159, Gaither), Zweig testified (7:1267) that Warehouse Supervisor Doug Sanders "is more or less the supervisor right above me."

The "more or less" description apparently is a bit ambiguous because Sanders, according to his responsibilities as listed by him, do not include direct supervision of stocking, but rather "entail inventory control, special projects, and dealing with replenishment of" Fleming's inventory. (5:853; 6:1017). As Sanders explains, Fleming's inventory replenishment system is computerized [actually, "computer driven" in that the system is programmed to initiate various warehouse activities] and bears the title "Fleming On-Line Operational Distribution System," or "FOODS." The computerized system tracks products, by assigned numbers, from the receiving dock to the order selec-

[12] The "duplicate" exhibits are not really duplicates because the copies tendered Reynolds did not have the signatures of the managers nor did her copies have all of the documentation of the alleged deficiencies.

tors' pulling slots. The aisles also have numbers as do the pulling slots. Pallet tags show this information. A 9-page booklet in evidence (RX 5) gives a basic outline of the system. FOODS became operational in November 1995. (5:853–865; 6:1007–1017, Sanders).

Manual steps taken by the stockers are keyed into the computer so that the cases of product can be located by checking the computer. If a step is not done properly, or not keyed into the computer, an inventory "discrepancy" is created and the item has become "lost" so far as the computer can determine. Stockers must submit their replenishment sheets (reports) daily so that leadpersons and supervisors can check the work for accuracy. (5:861–865, Sanders; 7:1240, Zweig).

Sanders testified that the 9-page booklet about FOODS was distributed to employees, including Vessie Reynolds, at training sessions in 1995. (5:859; 6:905). Sanders also distributed a March 5, 1997 "Position Description" (GCX 10) for stockers. (6:1011). The position description lists 10 major job responsibilities. I quote only the more relevant numbers here:

> 1. Replenishes order selector slots swiftly and accurately in order to eliminate circles. ["Circle" is a term indicating that a pulling slot is empty or out of stock. (4:631–632, Anthony; 6:911, 1011–1012, Sanders).]
>
> 2. Responds to circles immediately in order to eliminate line outs.
>
> 6. Responsible for completing replenishment sheets daily and enter moves into the FOODS computer system via RF and handheld terminals. Completed replenishment sheets are turned in daily to Supervisor's office.
>
> 7. Ensures reserve stock is in proper location.
>
> 8. Responsible for housekeeping in their area of responsibility.

That was followed by some training about a "White Tag Program" designed, according to a March 14 memo (RX 36) to all stockers from [Warehouse Manager] Dennis Strait and [Leadperson] Mitch Zweig, to clear freight off the floor from behind the [pulling' slots. (7:1235, 1283).[13] The purpose of moving the freight off the floor is to prevent the damage being done to the freight by forklifts. Zweig distributed the memo individually and discussed it with each stocker. Zweig knows that he gave a copy to Vessie Reynolds because he made a list (RX 37) of the stockers he gave it to, and Reynolds' name appears in second place among 25 listed names. (7:1236–1239).

Additional training during 1997 includes a one-page March 25 memo (GCX 8) from Strait and Zweig regarding 11-numbered "Daily Work Procedures," including number 7, as a reminder (emphasis added): "Complete your replenishment sheets *daily* and turn them in to the bin in the supervisor's office." (6:927; 7:1239–1240, 1283–1285). Reynolds confirms having received a copy of this memo from Zweig. (5:730). Richard Campbell also confirms the training, about March, concerning the replenishment sheets. (4:615–617).

[13] Sanders testified that the purpose of the white tag program is to tag any overflow merchandise that remains in the storage space when there is not room for it in the pulling slot. (5:857; 6:925).

This was followed by yet another training session on June 18, as evidenced by a memo (RX 6) of such date titled, "Stockers' Meeting." Sanders testified that Reynolds was present at the meeting because he picked a time when all the stockers could be present. It was Sanders who covered the 8 numbered points in the memo. (6:908–914, 1049). [Zweig was not present. (7:1293).] The first one is the most relevant here (emphasis in original):

> 1. **Stockers are to ensure that they had** [have] **completed their** replenishment for that day before they leave. It is their responsibility to check to make sure are [all or their] circles were stocked and any scratches announced before they leave. It is not the late stocker's job to complete their work so that they can leave at 2:30.

Sanders testified that the warehouse has four major sections, and that each of the major sections has a "late stocker"—a person who stays after 2:30 to remedy "any out-of-stocks that may happen after the stockers finish their replenishment and leave for the day." That is their "only job." (6:912–913).

Although Reynolds was a stocker, until October 24, 1997 Reynolds performed her stocking duties in the Cosmetics Department. (3:463, 471; 5:723; 6:1049; GCX 63). The white tag program was not used in Cosmetics during the relevant time. (5:723, Reynolds; 6:1020–1021, Sanders). On October 24 Cosmetics apparently had to reduce its stockers from two to one. Because Reynolds had the least seniority, she was transferred to the position of "floating" stocker. (3:454, 471; 6:1028–1034; GCX 63).

On August 25 Reynolds received a written warning, dated August 21 (GCX 11; RX 7), for several enumerated work deficiencies noted during the period of August 11 through August 15. As mentioned earlier, the complaint attacks this warning.

The day of her October 24 transfer to the position of a floating stocker, Reynolds received an interview (RX 8) for an untimely submission of her replenishment sheets for October 14, and inconsistency in completing a checklist form. [The complaint has no allegation concerning this warning. Fleming offered it as bearing on motive—as tending to show lack of a design to use any occasion to punish Reynolds for her union activities. (6:932). Sanders testified that he likes to give employees the benefit of any doubt and he simply wanted to increase Reynolds' "awareness level" by the interview. (6:945).]

A month later, on November 26, Reynolds was give a written "Final Warning" (GCX 13; RX 3) for several items of alleged bad performance during the period of November 10 through November 25. The final warning is attacked by the complaint.

b. The written warning of August 25, 1996

(1) Facts

The week (Monday–Friday) of August 11 through 15, 1997 Reynolds substituted for stocker Yolanda Edwards while Edwards was on vacation. (3:459, 469; GCX 11 at 1). Edwards' section is not specified, although an Aisle 12 is mentioned (GCX 11 at 2; 7:1272). Clearly it was not in Cosmetics, for in Edwards' section the White Tag program applied, as we shall see. Although Reynolds thought she had done a good job while

substituting for Edwards (3:459), on Monday, August 25, shortly before 2:30 p.m., Reynolds was summoned to the office of Warehouse Manager Dennis Strait where, in the presence of Leadperson Mitch Zweig, Strait issued her a written warning, dated August 21 (GCX 11), for alleged deficiencies in her work performance while substituting for Edwards nearly 2 weeks earlier. (3:458–459, 470; 5:716–717).

There is no evidence that during the week when Reynolds substituted (August 11–15) she was ever told that she was doing something wrong. Nor is there any evidence that Leadperson Zweig ever came and asked her if she had any questions. On the other hand, there is no evidence that Reynolds, substituting in a section that operated with white tags, ever asked Leadperson Zweig for a refresher on his instructions concerning the March 14 memo (RX 36) about the White Tag Program. Unpleasant consequences resulted from this lack of communication, and white tags are only one part of the asserted problems.

Discovery of the alleged problems occurred in this fashion, Zweig testified. At the end of that week, on Friday, August 15, Zweig was helping the late stocker, James Bolton, because Bolton had to stock a large number of circles that day. (7:1269, 1294, 1302). When Zweig entered a [pallet] number into the computer, the computer showed a large amount of stock in the slot. To doublecheck, Zweig went and observed that the slot was empty [a circle]. But there were two layers of freight in the reserve location. "Right then I knew something was wrong." (7:1269, Zweig). This was the area stocked that day by Reynolds. (7:1269, 1303).

From there Zweig went into the "real time" computer and tracked Reynolds' entries for that day and decided to do an "area check." That check revealed more problems. After Zweig made his investigation (7:1268), he reported the matter to Supervisor Sanders (6:920, 923) who made his own investigation of the reported discrepancies (6:915, 920, 923). Following his own investigation, Sanders prepared the hand printed warning sheet, or cover page, and typed the two-page attachment of stated deficiencies. (6:915, 920, 930). Zweig testified that while he did not prepare the document (GCX 11; RX 7), the observations and conclusions stated on pages 2 and 3 are also his. [From my own notes and recollection, I find that "are also his" is the sense of the somewhat garbled transcript at 7:1294:6.]

Sanders was not present when Strait delivered the warning to Reynolds. (6:943; 7:1293–1294). Sanders did not sign the original file copy. (RX 7). Strait and Distribution Manager Mark Aldridge signed the document (or dated their signatures) on August 26. (RX 7). Sanders was absent because when he presented the matter with the documentation to Strait and Aldridge, Strait personally took charge of presenting the warning to Reynolds. (6:942–943, Sanders).

The text of the covering page, or written warning, reads:

> It was necessary to give you a written warning for bad job performance while stocking. (See attached sheets.) All stockers are expected to follow established work policies and procedures in the performance of their daily duties as a stocker.

For future action the document warns, "Further discipline up to and including termination."

The two attached pages, also dated August 21 and titled "Vessie Reynolds Bad Performance Issues," read:

> During the week of August 11 thru 15, you were directed to stock in Yolanda Edwards' section while she was off on vacation. The following serious stocking discrepancies were discovered while Mitch Zweig was performing a check on your weekly replenishment activity for that time period.
>
> 1. According to the KNONOS time sheets [RX 39, apparently], you left each day at the end of an eight hour shift while turning in your replenishment sheets that were not completed. These sheets reflected that over 50% of replenishment lines were not done. It is the stocker's responsibility to complete their replenishment sheets daily before they leave as outlined in the stocker's job description (3/5/97) [GCX 10] and the daily work procedures (3/25/97) [GCX 8]. This subject was reiterated in a stockers' meeting held on 6/18/97 [RX 6]. Completing replenishment sheets on a daily basis is crucial in maintaining proper stocked level of product for the selection process.

Reynolds admits that she left at 2:30 p.m. and that, in so doing, she left without completing her replenishment sheets. Moreover, she further admits that leaving without completing her replenishment sheets means that she would be leaving "a number of circles"—that is, a number of empty slots. (3:459; 5:718–719). Reynolds defends her 2:30 p.m. departures on two grounds. First, Fleming has a late stocker who can stock merchandise after the regular stockers have gone home. (3:460; 5:719). Indeed, for a couple of years Reynolds worked as a late stocker and she filled slots which the order selectors would call out as circles. (3:460; 5:719). Second, Reynolds claims that Zweig told her, and perhaps others, about the time of the union organizing, that he wanted the replenishment sheets turned in daily even if they were incomplete. (3:469; 5:718–719).

Zweig did not deny, or offer some clarification, on the latter point when he later testified. I therefore accept Reynolds' assertion to the extent it is consistent with the credible evidence. Thus, I find that it is not credible that Zweig repudiated the March 5 job description (GCX 10, item 6), the March 25 daily work procedures memo (GCX 8, item 7), or point 1 (RX 6) that Supervisor Sanders made at the June 18 meeting with the stockers (6:911–913, 1051). What Zweig may have said, based on the credible evidence and Reynolds' assertion, is that, should there be some reason a stocker cannot remain after 2:30 p.m. on occasion to complete his or her replenishment sheet, then drop the incomplete sheet off at the supervisor's office on the way out. Such a statement clearly is not a repudiation of management's several written and oral instructions about the important need to complete the replenishment sheet before leaving. As Sanders told all the stockers (including Reynolds) on June 18 in point 1 (RX 6, bold in original):

> 1. **Stockers are to ensure that they had** [have] **completed their** replenishment for that day before they leave. It is their responsibility to check to make sure are [all or

their] circles were stocked and any scratches announced before they leave. It is not the late stocker's job to complete their work so that they can leave at 2:30.

Mitch Zweig confirms that such is the duty of the regular stockers and that late stockers do not perform the work of the regular stockers. (7:1231–1233, 1280). As Sanders (6:913, 1051) and Zweig (7:1231–1232) explain, late stockers remain and fill the circles called out by the order selectors who work after 2:30 p.m. on work generated after the regular stockers have gone. The late stockers do not work from the replenishment sheets.

Recall also that there are only four (4) late stockers for the entire warehouse, one for each major section, with an average of five regular stockers per major section. (6:912–913, Sanders). Neither Reynolds nor the Government suggests how, if all regular stockers stopped work at 2:30 p.m. and clocked out, leaving incomplete replenishment sheets, these four late stockers could do their own work plus all the remaining work left by all the regular stockers. That would have one late stocker "trying to cover an area that we have four (4) or five (5) [regular] stockers in." (6:913–914, Sanders). Obviously, the point is made by management in the Position Description, item 6 (emphasis added)—"Responsible for *completing* replenishment sheets *daily* . . . . **Completed** replenishment sheets are turned in **daily** to Supervisor's office," (GCX 10); in item 7 of the March 25 Daily Work Procedures (GCX 8); and in point 1 (as quoted earlier) made by Supervisor Sanders when he met with all stockers on June 18 (RX 6; 6:911–913, 1051). And to remain beyond 2:30 p.m. the stockers did not have to obtain permission to work overtime. If overtime is abused, Sanders explains, that is addressed separately. Zweig testified that he can make a preliminary determination whether someone has abused overtime pay by checking on the number of units of work done by the employee that day. (6:913, 1041–1042, Sanders; 1051; 7:1233, 1280, Zweig).

Reynolds testified (as did others) that serving as a substitute stocker in an unfamiliar section is not as easy as stocking in one's regular section. (3:460–461). No doubt that is true, and perhaps that contributed to Reynolds' failure to complete her replenishment sheets. Even if the benefit of doubt is extended to Reynolds (that she sincerely thought it proper for her to stop at 2:30 p.m. and to leave the balance of her work for the late stocker), the counterpart also applies—the benefit of doubt (purity of motive) is extended to Fleming in view of all the written and oral instructions about this topic. Perhaps Fleming could have cut Reynolds some slack in view of her unfamiliarity with Edwards' section. Had Reynolds made only one or two errors, perhaps Fleming would have been lenient.

The extensive nature of Reynolds' mistakes, however, apparently angered Warehouse Manager Strait. Strait appeared angry when he read the warning to Reynolds, and in the meeting he accused her of sabotage. Implying that she was intimidated, Reynolds testified that she asked no questions. (3:459–460, 464–467, 470–471). Strait's angry appearance, while unprofessional, may well be explained by what he apparently viewed as a deliberate disregard of standing, explicit instructions. There is testimony about a certain laxity of enforcement of rules in general. Recall the observations which Aldridge made in the fall of 1996. Indeed, Annette Bland testified that as a stocker in 1996 she would throw away some of her replenishment sheets, and that even in 1997 there were times that, if she did not finish, she waited until finishing the work the next day before submitting her replenishment sheets. (2:265–266). [As to Bland, in a couple of paragraphs I mention the discipline she received for this in May 1997.] Recall, however, Mitch Zweig's testimony that, on being promoted to leadperson in January 1997, he set about to subdue the laxity dragon. (7:1279). Nothing done by Bland in 1997, particularly after Sanders' June 18 meeting with the stockers, is shown to have been anywhere near the extensive set of mistakes detailed in the written warning delivered to Reynolds on August 25.

Before returning to the warning and item 2, I must note Zweig's testimony that it is important for stockers to submit their completed replenishment sheets daily in order that he can check and see what work the stocker did that day. (7:1240). And as Sanders adds, it is so that supervision can check the work for accuracy. (5:865). One wonders whether Zweig and Sanders did this for each day that Reynolds substituted. If so, did they find that she was not submitting her replenishment sheets daily? If so, they could have told her, discussed any problems with her then, and perhaps have avoided the unpleasant events we see here.

I note that Sanders concedes that, at times, stockers forget to turn in their replenishment sheets at the end of their shift, but that, in such cases, they generally do so the first thing the next morning. (6:930). Even so, warnings have been given for this in past years (RX 15 to Ceolia McRae on 11–18–94; RX 14 to Herman Whitten on 4–20–95; and RX 29 To Steve Puckett on 12–5–95), and Annette Johnson [Bland] received an interview (RX 32) on May 13, 1997 for failing to turn in her replenishment sheets. Next time, she was told, a written warning would issue. Isaac L. Lias was issued a written warning (RX 34) for, among other problems, failing to complete his replenishment sheets daily. The attachment instructs him, in relevant part, "Stay at work until all replenishment sheets for that day have been pulled and turned in to the section supervisor." Lias is one of those named on Gaither's list of the "Hardened Hearts And Minds." The complaint does not name Lias as a discriminatee in any respect. Turn now to discrepancy number 2.

2. A check was done on one of your daily replenishment sheets for accuracy on pulling your replenishment lines. There were two lines that you had keyed in as completed but the mdse with designated pallet tags were [was] still in reserve location instead of the pulling slot. This would lead to serious problems in locating the mdse and possible line out of the item since the reserve location would no longer be listed in the computer. Keying in pallet tags on replenishment lines without moving the mdse into the slot is considered as falsification of company records (production) and is listed in the company's work procedures (1/15/97) [Rule XXII.2.C.; GCX 3 at 8] as a serious offense which could lead to further discipline up to and including termination.

Zweig testified that the foregoing is what he found in the area which Reynolds stocked "that day." (7:1269, 1271, 1303). He traced the entries she made on the computer. (7:1270). Taking Reynolds' replenishment sheets, Sanders also visually checked and found several cases still in the storage area even though they had been keyed [into the computer] as having been moved to the pulling slot. The replenishment sheets were the responsibility of Reynolds. (6:924–925).

Reynolds does not believe that she made this keying error. (3:461). However, Reynolds admits that "Scott," one of the "lumpers,"[14] helped her that week, that under her direction, Scott would handle some of the replenishment sheets and would put some of the items into the pulling slots. Reynolds thought Scott had done "a pretty good job." (3:461–463). On cross examination Reynolds contends as to paragraph 2 that (5:721–722):

> I didn't do it. Because when I was given this write-up, nobody gave me anything to prove to me that I had made this mistake. All they gave me was this [GCX 11] saying that I did it, but there was no proof that I did it and I have been stocking for a pretty good while and I think I do a pretty good job. You know, I'm not saying that I don't make mistakes, because I'm human, I do make mistakes. But I don't know if I'd done it. I just can't say I did do this.

Responding to questions, Reynolds asserts that no one took her to the section and showed her the evidence, nor did she go out there to inspect the evidence. (5:721). Of course, these last two questions and answers appear to be an exercise in silliness. The allegedly defective work occurred on Friday, August 15, but the warning interview was being conducted 10 days later—mid-afternoon of Monday, August 25. There is no evidence that Fleming preserved or photographed the physical conditions as the police might do of a crime scene. That is, Fleming's normal business operations during the week of August 18–22, and Monday August 25, presumably eliminated any possibility that Reynolds could have gone out late on August 25 and found the physical conditions that allegedly existed 10 days earlier.

Zweig testified that he also spoke at the meeting, trying to explain what had been found and the methods used. This included showing Reynolds the "computer generated printout sheet and the replenishment sheets and everything that we had together. I'd shown her the sheets that I found and then I'd shown her the markings on the replenishment sheet, the list that I generated off the computer." Reynolds asked no questions respecting any of the documentation. Actually, Zweig only "tried to" show these matters to Reynolds because "she wasn't responsive to even want to see them. She said, 'I don't have to see them, I don't need to see them.'" (7:1293, 1301–1302). Reynolds did not testify at the rebuttal stage and deny or explain these specifics given by Zweig, although she had asserted generally, as quoted above, that no one had showed her any proof that she had made the errors.

[14] "Lumpers" are not payroll employees of Fleming. They appear to be independent contractors who assist in unloading trucks. (6:1079, 1096; 7:1175).

Unlike trial evidence respecting the final warning, which I cover later, neither Fleming nor the General Counsel offered the supporting documentation for the warning (GCX 11; RX 7) here. In effect, the situation here is Reynolds' word against Fleming's. Fleming asserts; Reynolds denies. That standoff does not get the Government over the procedural hump of demonstrating, prima facie, an unlawful motive. The General Counsel needs to expose deficiency item 2 to be false. Even if Reynolds' denial somehow were sufficient to do that [combined, for example, with an unfavorable demeanor projected by Zweig), Reynolds' account is damaged by her admission that a lumper, handling the replenishment sheets, assisted Reynolds by filling some of the pulling slots. The lumper, "Scott," did not testify. The Government's evidence fails to get over the procedural hump respecting deficiency item 2. Turn now to alleged deficiency item 3.

> 3. Mdse was found in two locations behind the line that you had keyed to the pulling slot but had failed to use the white tags to indicate such action as set forth in the white tag program (3/14/97) [RX 36]. This program was set forth [as Sanders testified, 5:857; 6:925] to distinguish slot overflow mdse that had been keyed to the slot from the mdse that is still assigned to a reserve location.

Asked about this alleged deficiency, Zweig testified (7:1271):

> Well, that [the] printout that shows all of the daily moves[,] the pallet tag numbers are listed on that sheet. [That printout, or sheet, is not in evidence.] The pallet tag numbers were behind the Reserve, the cases were behind the Reserve, but there was no white tag on that freight. That pallet tag number was still showing and it was the pallet tag number that matched the pallet tag number on her daily key sheet.

Sanders confirms, adding that a late stocker would not know if product is overflow if it is not tagged. "There's not a tag on there indicating where that merchandise needs to go to." (6:925–926).

As Reynolds herself explains (similar to the example given by Sanders at 5:857; 6:925), if a pallet has 30 cases, but the pulling slot can hold only 14 cases, then the extra 16 cases, the "overflow," is placed in reserve "behind the line." (3:463). As cases are removed from the slot, replacement cases can be pulled from behind the line and moved to the slot. The key point is that Fleming's white tag system [RX 36] is designed to show that that group of cases behind the line already has been keyed into the computer as part of the group placed in the slot. It is part of Fleming's inventory tracking system.

Reynolds essentially admits this allegation, but defends on two grounds. First, and as noted earlier, she regularly stocked in Cosmetics where white tags were not used. Second, she marked the tag, and stockers were still familiar with the old system and the late stocker would know that the marked tag meant that the product in reserve was already keyed into the computer as part of the group in the slot. Thus (3:464):

> I guess at the time I didn't realize, you know, that I was supposed to use the white tags [this is essentially saying that she paid no attention at the training sessions simply because her

> department, Cosmetics, did not use the white tags], but I did—I did put them behind the line and the original tag I would draw a line through it and leave that number of the slot on that item so the next person if I'm gone home and that slot has ran down they would still know to come and pull the merchandise out so I don't see how I would be sabotaging anything of that nature.

On cross-examination Reynolds continues (5:723):

> I left the original tag on it with that number on it so that I would know to put it [the overflow cases sitting in reserve behind the line] into the slot when it [the slot] got low enough [with the same type cases as those sitting behind the line] for me to put it in.

"Q. Ms. Reynolds," Fleming's counsel then inquired (5:723), "in doing what you just described, how would a late stocker then know where that merchandise should go?" [Recall Sanders' testimony, cited above, that a late stocker would not know that product is overflow if it is not tagged.] Reynolds answered as follows (5:723–724):

> Oh, they would know because we just had gotten off into using the white tags, we were very familiar with using the regular tags, putting the merchandise behind the line and we would just use the regular tags that they use from receiving and just put the left over amount behind the line. We just had really gotten off into using the white tags so everybody was still familiar with the regular tags.

The late stockers may have still been familiar with the old system of using the regular tags, but it is silly for Reynolds to suggest that it was only recently that the staff had begun using the white tags. Zweig explained the White Tag Program (RX 6) to the stockers, specifically including Vessie Reynolds, and distributed copies of the program memo to each of them, on March 14 (7:1235–1239, 1283; RX 37)—just about exactly 5 months earlier than the incident in question here. As the stockers had been working with the white tag system for 5 months, it seems only logical that a busy late stocker, not seeing a white tag on the facing case in a group of cases sitting in the reserve behind the slot, might not get close enough to check and see whether makings from the old system were on the regular tag. In short, Reynolds was zigging when everyone else was zagging.

But, the General Counsel argues (Brief at 18), not everyone else was zagging because Annette Bland testified that on occasion she has forgotten to use white tags, yet Zweig merely reminded her to put them on, and she "was never disciplined for failing to use white tags (368)." The General Counsel distorts Bland's testimony. Bland testified that on some occasions when Zweig came through he saw that she had not put on some of the white tags. He reminded her to do so before she left for the day. (3:368). Bland was an open supporter of the Union. (2:274; 3:337–338, 354). Under her maiden name, Annette Johnson (2:256–257, 269), Bland is named on Gaither's list of those with "Hardened Hearts And Minds." Had Zweig passed through where Reynolds was substituting and seen that some white tags were missing, nothing indicates that [as of August, as distinguished from November] he would not have reminded Union supporter Reynolds, as he has reminded Union supporter Bland, not to forget her white tags. That situation is entirely different from the situation here—where Reynolds had already gone home and the missing white tags constituted only one of several problems.

Disciplinary Interviews for white tag-violations issued on June 19, 1997 to Thin Nguyen (RX 16) and to Bill Pattat (RX 17), neither of whom wore any union insignia. (6:1038–1039).

To close this point, it appears that the Government, once again, has failed to surmount the procedural hump. Had the white tags been the only problem, perhaps Fleming would have issued Reynolds nothing more than a disciplinary interview as a wake-up notice. The Government has failed to show, prima facie, any unlawful motivation as to deficiency number 3. Turn now to alleged deficiency number 4 (which has a tag-along paragraph about Monday, August 18).

> 4. Your replenishment sheets from the previous day were found on a pallet in 12 aisle. Two lines had been pulled but were never keyed in. There were no other marks on the sheets to indicate that the replenishment lines had been pulled. All replenishment moves are to be keyed in daily and the replenishment sheets are to be turned in daily at the end of the shift as outlined in the stocker's job description (3/5/97) [GCX 10, item 1] and the Daily Work Procedures (3/25/97) [GCX 8, item 7]. Keying the pallet tags on a daily basis is very important in maintaining accuracy in our replenishment system. Sheets found lying in reserve from a previous day could be considered deliberate discarding of production documents which is a serious offense in our company's work procedures [Rule XXII.2.D.; GCX 3 at 8] and could lead to further discipline up to and including termination.
>
> On Monday, August 18, you were stocking back in your section in the Cosmetic room. You failed to turn in your replenishment sheets at the end of the day. There were 23 replenishment pulls that were completed but were never keyed in. This has the same implications as mentioned in #4 above.

Zweig testified that he found Reynolds' replenishment sheets on a pallet in Aisle 12. (7:1272). Sanders explains that when they could not find Reynolds' replenishment sheets as having been submitted from the previous day [it is unclear whether the "previous day" was Thursday, August 14, or Friday, August 15], Zweig went back and found her replenishment sheets on a pallet in Aisle 12. Sanders then checked regarding the two lines pulled—product that had been physically "moved from the storage to the pulling slot but had not been keyed in." Sanders went to the locations involved and personally observed the situation. (6:926–927).

Reynolds testified that she does not have "any recollection" of having left her replenishment sheets in Aisle 12. Continuing, Reynolds asserts (3:465):

> I keep my replenishment sheets stapled together. Although this young man ["Scott" the lumper, apparently] was helping me and I had to take them loose and I let him have one at a time and like I say he would pull the items down low. He was giving them back to me so I would stack them up and staple

them back together so I don't understand how that could happen.

As to the part about sheets found "lying in reserve," Reynolds likewise has no recollection of that. (3:466). Respecting the "deliberate discarding," Reynolds asserts that such is when Strait accused her of "sabotaging inventory." She would never do anything to hurt her job, Reynolds testified. (3:465–467). Reynolds does not specifically address the asserted failure to submit her replenishment sheets for Monday, August 18.

Crediting Zweig, and also Sanders, I find that Reynolds in fact left her replenishment sheets on a pallet in Aisle 12 where Zweig found them. Paragraph 4's reference of sheets found "lying in reserve" apparently is a reference to the same sheets found on the pallet and not to a second incident of other sheets found in a separate location. The fact that in 1996 Annette Bland may have discarded her sheets is irrelevant to the new conditions in 1997. As Bland asserts, in somewhat ambiguous and incomplete testimony (2:266), what she did then was before the new system was installed. In any event, as already noted, on May 13, 1997 Bland was given a disciplinary interview (RX 32) for failing to turn in her replenishment sheets, and was warned that the next time a written warning would issue.

Earlier, on April 7, Isaac L. Lias [one of those on Gaither's list of "Hardened Hearts and Minds"] was given a written warning (RX 34) for, in part, failing to turn in his replenishment sheets. Despite his presence on Gaither's list, Lias is not named in the complaint as a discriminatee respecting either this warning or anything else.

To some extent the evidence concerning deficiency paragraph 4 repeats that already summarized regarding deficiency number 1. Having credited the accounts of Zweig and Sanders here, I find no unlawful motivation respecting item 4. That includes the matter for Monday, August 18, which the parties did not specifically address at trial. To the extent Reynolds' assertion (3:466) that she has always turned in her replenishment sheets is a denial of the Aisle 12 matter, I do not credit her. If it is a denial of the August 18 matter, I find it immaterial as to the issuance of the warning. As Fleming offered no trial evidence respecting Monday, August 18, Reynolds' assertion could be considered as rebutting that last "tag-along," or footnote, paragraph. But that paragraph is merely a footnote to the warning which, I find, would have issued even had there been no reference to the August 18 matter.

(2) Conclusions

Respecting deficiency paragraphs 1 through 4 of the August 25 warning, I have credited Fleming's evidence over that of the Government. Because the General Counsel failed to show, prima facie, that a moving reason for Fleming's August 25, 1997 issuance of the written warning (GCX 11; RX 7) to Vessie Reynolds was her activities on behalf of the Union, I shall dismiss complaint paragraph 17(a).

c. The final warning of November 26, 1997

(1) Introduction

Following her August 25 receipt of the written warning (GCX 11; RX 7), on October 24 Vessie Reynolds received [as mentioned earlier] a disciplinary interview (RX 8, not alleged in the complaint) for (1) delayed submission of replenishment sheets and (2) inconsistent completion of forklift checklists. Recall that on that same October 24 Reynolds was transferred from her stocker's position in Cosmetics to be a "floating" stocker. (GCX 63). [The complaint does not attack the transfer as unlawfully motivated (3:471; 6:1033), and the Government seeks no finding respecting it.]

A "floating" stocker is a stocker not assigned to a specific area or department, but a stocker who, as the term implies, fills in for other stockers who are absent because of illness, vacation, or other reasons. (1:108–109; 3:471; 6:1048–1049; 7:1234). The stockers' job description (GCX 10) applies equally to floating stockers. (7:1234, Zweig). For several reasons a floating stocker's job is more difficult than the work of a regular stocker. First, the "floater" is unfamiliar with what has been going on in the section. Second, it takes time to learn the new section. Third, there is a lot of accumulated work to be done when the regular stocker has not kept up his section. This has to be done while responding to the calls by order selectors and those made over the intercom. (2:273, Bland; 4:642–644, Anthony).

Notwithstanding the greater difficulty of a floater's job, the Government, as noted, does not attack the economic basis for the reduction of one stocker in Cosmetics, the selection of Reynolds as the stocker to be transferred, or her October 24, 1997 transfer to the position of floating stocker.

A month after her October 24 transfer, Reynolds was given a final written warning, dated November 26, 1997. (GCX 13; RX 3). The copy (GCX 13) given to Reynolds consists of a cover page (the warning proper) with text and the signatures of Warehouse Supervisor Doug Sanders and Leadperson Mitchell A. Zweig (with Dennis Strait and Sanders signing that Reynolds refused to sign) plus two pages of alleged discrepancies in work performance described in paragraphs numbered 1 to 6. The discrepancies assertedly were found by Zweig in a check made for the period of November 10 through 25. Human Resources Manager Gaither (6:952) prepared the cover page, and Sanders prepared pages 2 and 3. (6:952; 7:1267).

Zweig testified that he performed the review of Reynolds' section. On showing the paperwork to Supervisor Sanders, Sanders inspected some of the matters right then, and then took the paperwork. (7:1266–1267). Sanders testified that he investigated the matter, formed a recommendation for management as to the appropriate discipline, and conferred with management concerning the proper discipline. (6:951, 977–979). Asked as to what triggered his investigation, Zweig testified that it was the sight of a lot of freight, on pallets, on the floor in the section where Reynolds was substituting and after she had left for the day. This was Monday, November 10, Reynolds' first day to substitute in the section. Seeing other problems as well, Zweig decided to keep his eye on the area for the rest of the week. (7:1256–1257). Zweig asserts that a late stocker would not have left all the pallets on the floor because they simply pull a pallet and put it into a slot. Neither would order selectors have been the cause of the mess because they do not operate the equipment needed to pull pallets off the racks and put them on the floor. (7:1257–1258).

The work examined was that which covers the third and fourth weeks, plus 2 days into the fifth week, after Reynolds had been transferred to the more demanding work of a floater. In other words, only Reynolds' work her first 2 weeks as a floating stocker was not examined (or at least not covered by the warning). Fleming's file copy (RX 3) [also bearing the signature of Distribution Manager Mark Aldridge dated December 1] has 45 pages, with the last 42 pages (4 through 45) being the supporting documentation. The array of management representatives facing Reynolds in Warehouse Manager Dennis Strait's office for this final written warning were Strait, Warehouse Supervisor Doug Sanders, and Leadperson Mitch Zweig. (3:484–485; 6:980). The warning was delivered to Reynolds on Wednesday, November 26, a few minutes before her shift ended at 2:30 p.m. (3:484).

Sanders read the final warning (pages 1 through 3) to Reynolds. (3:484, 486; 6:952–954, 980). Reynolds asked no questions until Sanders had finished, when she asked Zweig for a copy of the warning. (3:486–488; 5:729–730; 6:953, 956, 981, 983). She was given a copy of the first 3 pages (GCX 13), but not (3:491–492, Reynolds) of the 42 pages of documentation because, Sanders asserts (6:953), she did not request a copy of that. On the other hand, neither did Sanders offer a copy of the 42 pages to Reynolds. (6:1035–1036). Sanders testified that the documentation was not attached to the three pages of the warning, but was sitting there on the table. (6:954, 980).

Actually, there is no evidence that Sanders, or anyone, informed Reynolds that the stack of 42 pages sitting on the table (separated from the 3-page warning) was the supporting documentation for the warning. Asked how Reynolds would know to ask for copies of the supporting documents, Sanders replied that "the actual supporting evidence is kept in her personnel file." (6:953). The answer apparently means that Fleming charges employees with such knowledge and that if they want a copy they have the burden of asking for one. Reynolds asked no questions because, as she explains, she felt that, with the warning in typed form, and in the tone of voice it was delivered, the three already had made up their minds, and therefore it would be better for her just to listen. (5:737).

(2) Facts

The text of the warning proper reads (GCX 13 at 1; RX 3 at 1; emphasis in original):

CIRCUMSTANCES:

Vessie Reynolds has received previous warnings, including a written warning on August 26, 1997 [GCX 11; RX 7] concerning her poor job performance and not following established stocking procedure. Most recently, Lead Person Mitch Zweig identified several performance issues from November 10, 1997 through November 25, 1997 as evidenced in the attached [pages 2–3] November 26, 1997 write up. Vessie continues to be very inconsistent about properly completing her replenishment sheets, turning the replenishment sheets in daily, completing her replenishment daily before going home, pulling her replenishment in layers and not stair-stepping, pulling empty pallets daily, and keying in product and leaving in the reserve. This list is not all inclusive of the poor performance issues demonstrated by Vessie.

WHAT THE COMPANY EXPECTS:

The company expects all stockers to follow stocking procedures set forth without exception. Vessie willingly continues to not follow procedure, which in turn creates additional problems through the system. During an interview on 10–24–97 [RX 8], Vessie requested and received another copy of the expected work procedures. [The March 25 memo on Daily Work Procedures is GCX 8. Apparently confusing that memo with the earlier one of March 14 (RX 36) dealing with the White Tag Program, Reynolds testified that Zweig gave her a copy of the white-tag memo on the warehouse floor one day.] Mitch Zweig and Doug Sanders will cover stocking procedures one last time with Vessie. Should Vessie have any questions or misunderstandings she needs to clarify now.

Since two major concerns with Vessie's performance have been her (1) failure to complete her replenishment daily before going home and (2) not consistently turning in her replenishment sheet daily. [sic] ***It will become a requirement, effective immediately, for Vessie to contact her Lead Person, Mitch Zweig, each afternoon before going home and present her replenishment sheet to him.*** This procedure will remain in effect until revoked in writing by Fleming management. In case Mitch is absent or not available, Vessie may receive permission to leave by **Dennis Strait, Mark Henry, or Mark Aldridge.**

FUTURE ACTION:

This is an all encompassing final warning. If Vessie violates any procedure, company rule, or fails to follow through on requests of her supervisor, whether given directly to her from her supervisor or given indirectly through the lead person, or leaves at the end of the day without contacting one of the individuals listed above, any such action may lead to separation of employment.

Pages 2 and 3, dated November 26 and titled "Vessie Reynolds Bad Job Performance Issues," has a preamble stating that the following "serious stocking discrepancies were discovered while Mitch Zweig was performing a check on your replenishment activity for the time period of [Monday] 11/10/97 thru [Tuesday] 11/25/97." The balance of pages 2 and 3 consist of the 6 numbered paragraphs. They provide as follows.

1. A check was completed on the accuracy on pulling your replenishment lines. On [Monday] 11/10/97, there were two lines that you keyed in as completed but the mdse was still in the reserve. On 11/24/97, there was one line that you keyed in as complete but the mdse was still in the reserve. On 8/26/97 you were given discipline [GCX 11 RX 7] on this same issue and told that keying in pallet tags on replenishment lines without moving the mdse to the slot was considered as falsification of company records (production) and is listed in the company's work procedures (1/15/97) [Rule XXII.2.D; GCX 3 at 8] as a serious

offense which could lead to further discipline up to and including termination.

2. On 11/20/97 [Thursday], you turned in your replenishment sheets that were improperly filled out. On that same day, the late stocker had a lot of circles in your section. This is an indication that you did not complete your replenishment for the day before you left. You were given discipline on 8/26/97 [GCX 11; RX 7] about leaving before completing your replenishment sheets.

3. On 11/14/97 [Friday] and 11/25/97 [Tuesday] you did not turn in any replenishment sheets at the end of your work day. On 8/26/97, you were given discipline [GCX 11; RX 7] on not turning your sheets in at the end of your shift as outlined in the stocker's job description (3/25/97) [GCX 10] and the daily work procedures (3/25/97) [GCX 8].

4. On 11/24/97 [Monday], the section supervisor [name not given, but not a supervisor over stockers (6:995, 1009–1010, 1048, Sanders)] reported a high number of circles in that section early afternoon even though there were only three selectors pulling at that time. A check of your replenishment activity indicated that there had not been any replenishment activity since 10 a.m.

5. On 11/24/97, there were numerous pallets found in reserve that were stair-stepped. The replenishment system is set up for the stocker to pull in layers. There should be no stair-stepping if your replenishment is pulled correctly.

6. On the indicated days an area check was done on your section after the end of the day. The following discrepancies were recorded:

A) 11/17/97 [Monday]— pallets left on the floor white tag freight had not been stocked cut box tops lying around in the section

B) 11/18/97 [Tuesday]—white tag freight was still not stocked cut box tops still left in the section

C) 11/24/97 [Monday]— stair-stepped mdse numerous empty pallets left in reserve

Respecting accusation number 1 (merchandise keyed in as being moved on two dates, November 10 and 24, but in fact was still in reserve), Reynolds asserts that Sanders did not take her out on the floor and show her the errors, and Reynolds does not believe she made them. (3:486–488).

There is a partial problem here with the evidence and the briefing. Neither party, either at trial or on brief, adequately correlates the "supporting" (6:974, Sanders) documentation (RX 3 pages 4–45) to the six numbered paragraphs of the discrepancy listings on pages 2 and 3 of the warning. [Actually, pages 16–37 and 39–44, certain replenishment sheets, apparently are merely illustrative rather than work discrepancies cited in the warning. (7:1263–1265, Zweig). Sanders merely confirms that the pages were present when he issued the warning. (6:973–974).]

As for Reynolds' trial complaint that, on November 26, Sanders did not escort her out to the area and show her the deficiencies, there is no evidence that such deficiencies (particularly the ones several days old) would still have existed the afternoon of Wednesday, November 26. Nor is there any evidence that the computer screens for those dates still could have been accessed, printed, and studied.

Reynolds' trial protest is understandable. Who could remember all the computer keystrokes, and freight handling, done days earlier. Even more, working from such a disadvantage, how would Reynolds, or anyone, have been able to have disproved the accusations (findings, actually, of management since the meeting was not to obtain her version, but to deliver the warning) against her? Had she not been intimidated by the appearance (warning already typed) of a "done deal," the "tone" of the meeting [impressing her as, apparently (5:737), hostile], and the imposing array of three management representatives opposing her, she possibly could have obtained more specifics by asking for the documentation and questioning them on the spot about the entries and documents.

As to accusation number 1, neither Zweig nor Sanders gives supporting testimony, or even points to the documentation that allegedly supports management's deficiency finding number 1. Consequently, Reynolds' denial is the only positive evidence on the point. This does not necessarily prove discrimination. [Sanders denies any unlawful motive. (6:1050).] It merely means, at this point, that no record basis is shown for management finding number 1.

Turn now to alleged discrepancy number 2. Did Vessie Reynolds submit improperly completed replenishment sheets on Thursday, November 20? Reynolds asserts that no such sheets were shown to her (3:488), and as earlier summarized, that fact is not disputed. This asserted discrepancy appears to be based on supporting pages 4 through 10 (of RX 3) which improperly contain lines drawn through some of the entries. The lines are not supposed to be there. (7:1258–1259, Zweig). Reynolds does not recall placing the lines there. (5:734). I find that Fleming had a reasonable basis for including discrepancy number 2 as a ground supporting the final warning.

Respecting discrepancy number 3, Zweig testified that he received no replenishment sheet from Reynolds for Friday, November 14, and that page 11, of RX 3, is his supporting document. (6:961; 7:1240, 1261–1262, 1285–1286, 1300). Page 12 shows the same for Monday, November 24. (6:962; 7:1262, 1286). Although the sheet is dated November 25, when Zweig prepared it the date covered is for the previous day. (7:1286). I therefore find that Fleming intended for the warning to list November 24 rather than November 25. Reynolds "would say" that she submitted her sheets. (3:492–493). Finding that Reynolds failed to submit her sheets that day, I find that Fleming had a basis in fact for its alleged discrepancy number 3.

Discrepancy number 4. Neither the section nor the section supervisor is identified. The asserted "check of your replenishment activity" apparently is referenced in Zweig's brief description (7:1262–1263) of RX 3 at pages 13–15. Supporting page 13 is the "Shift Summary." A part of it shows the stockers by name and number. Reynolds is listed as number 844. In the next column is the number of pallets —66—that she "keyed out" that Monday, November 24, and the time, in minutes (483) that she worked that day. (RX 3 at 13; 7:1262). A hand printed "7.55 hours" appears beside the 483 minutes. [483 minutes equal 8.05 hours on the standard 60 minute system. The 7.55 number (a bit over 7 and one half hours on the

100-unit system) apparently is reached by subtracting a 30-minute lunch from 8.05 hours.]

Before going further, I make these brief notes about the shift summary's report of all the stockers that day, even though the testimony does not. Of 18 stockers listed (excluding Zweig and two who have no units recorded despite time worked), 5 keyed out fewer pallets than did Reynolds, 2 had the same number, 66, and 10 had a higher number (with 108 being the highest, at 511 minutes worked, and 100 being the second highest, at 509 minutes worked). The average of the 10 highest is 85, and the average of all 18 (again excluding Zweig and the other two) is 70.1. The lowest, a 2, was done by stocker 853, Bolton, who actually worked 511 minutes that day. The record does not show what Bolton did besides his two pallets, nor does it show what Bentley, at 511 minutes and no pallets, or Kail at 337 minutes and no pallets, did while they were on the clock. The point is that Reynolds' figures, while not among the best, indicate that, in comparison with all stockers working that day, she produced at only slightly below average—and that is without factoring in the extra difficulty she faced as a floating stocker working in an unfamiliar section.

The record does not show whether those producing at Reynolds' level or below also received warnings for their production that day. Zweig testified that 80 to 100 "pulls" is average with the 100 number actually being better than average if done in 8 hours. (7:1281). Either the shift summary for November 24, 1997 reflects abnormally low numbers, or Leadperson Zweig needs to recalculate the numbers for a representative period to obtain a standard average. In short, Zweig may here be judging Reynolds against a mythical standard of about 90 pulls for 8 hours, when the real average for Fleming's stockers is about 70. Even if 80 pulls is treated as the low end of an acceptable range, the number of 80 is a good bit more than Fleming's actual average.

Turn now to RX 3 at pages 14 and 15. These pages reportedly show pallets moved as of, apparently, 2:28 p.m., and assertedly (6:962–963, Sanders; 7:1263, Zweig), by Reynolds. Someone, presumably Zweig, totaled (hand notation) the number of pallets as 66 (RX 3 at 15), with the last time entry of "1000315" apparently meaning 15 seconds past the hour of 10:03 a.m.[15] Although, as noted, both Sanders and Zweig assert that pages 14 and 15 are Reynolds', in fact neither her name nor her stocker number is listed on either page. Actually, pages 14 and 15 easily could be the pages of stocker Pattat, number 808, who also pulled 66 pallets that day, or of stocker Richardson, number 843, who likewise pulled 66. (RX 3 at 13). The only affirmative evidence linking pages 14 and 15 to Reynolds is Zweig's testimony (7:1263) that he observed the deficiencies, noted on pages 14 and 15, when he toured her assigned section, plus Sanders' generalized testimony (6:978–979) that he also checked the reserve areas noted in the documentation submitted by Zweig. [The Government did not test these assertions at trial, and does not argue that the pages are not shown to be those of Reynolds.]

But if pages 14 and 15 are those of Reynolds, and if her last replenishment activity occurred at 10:03 that morning, what did she do between then and her quitting time of 2:30 p.m.? Fleming implies that she did nothing. Reynolds credibly testified that she worked hard that day as a floater in the section of stocker Kenny Kimbrell. (3:493–494). She offers no explanation as to why the printout of pages 14 and 15 would show no replenishment activity by her after 10:03 that morning, or what she would have done the rest of her shift. On the other hand, Fleming offers no explanation of how Zweig, surely by 1 p.m., would not have seen that Reynolds (supposedly) had stopped work at just after 10 a.m., particularly if she was just sitting around polishing her fingernails.

The assertion in Fleming's accusation number 4 about circles is unsupported by any credible evidence. To the extent Sanders' generalized testimony is intended to support it, I find it far too generalized to do so. As I credit Reynolds' positive testimony that she worked hard that day, I further find that she worked hard at whatever duties would not have been reflected on page 15 after 10:03 that morning. As Reynolds' positive testimony has more substance than the air castles built by Fleming, I find no credible record evidence to support alleged discrepancy number 4. Thus, I find, Fleming had no reasonable basis for its assertions in accusation number 4.

Discrepancy number 5. This accusation is based on observations which Zweig made in the section that Monday, November 24, as reflected in the comments he noted on RX 3 at pages 14 and 15. (7:1263). These recorded observations assert that Zweig found some 16 empty pallets in the reserve areas, and 9 pallets "stair stacked," or "stair stepped." [If cases are not pulled in layers, as required, but a few from several layers, then "stair stepping" of layers results. (3:497; 4:616).]

I note that although Reynolds was never asked whether she did the stair stepping, she knows that it is improper. (3:497). She suggests that such could have been done by the late stocker. (3:499). Zweig disputes that, asserting that the late stocker simply pulls a complete layer and puts it into a slot. (7:1257–1258). Forklift driver Annette Bland testified that she recalls seeing Reynolds fill in for Kenny Kimbrell in October or November, and she did not see any empty pallets where Reynolds was working. She would have noticed such because the lift drivers take empty pallets out to the receiving dock. (2:272–273, 277–278). Reynolds does not specifically address the matter of empty pallets.

Reynolds credibly testified that when she comes into a section, most of the time the regular stocker has not been there for 2 or 3 days "and so they're just coming at me with a lot of work and I'm doing it as fast as I can." (5:735). Stocker Annette Bland credibly testified that Kimbrell fails to keep his section in proper order. (2:274; 3:350–351). Most telling of all, however, is Zweig's admission (7:1286) that he does not recall performing a check of Kimbrell's section for the week preceding Monday, November 24, the day focused on here. Thus, if Kimbrell left his section in a mess, and Reynolds was flooded with current work, Reynolds hardly had time to clean up the mess which Kimbrell had left.

[15] No testimony explains the numbers. And the lawyers, on brief, do not stoop to articulate their interpretation of these mundane details of the exhibits. That process of analysis apparently would be beneath their lofty dignity.

The problem facing both Reynolds and Bland is that they must recall from memory. By contrast, Zweig (I attach almost no weight to Sanders' "me too" testimony) was making daily notes. [Oddly, to avoid items getting "lost" in the computer, a fear expressed by Sanders (5:861), Zweig did not promptly tell Reynolds about the discrepancies he was noting. He could have done so and Fleming still have given her a warning. Instead, Zweig decided (7:1257) on November 10, the first day, to watch her the rest of the week, and that observation period expanded through the next week and then into the third week.]

Even assuming that pages 14 and 15 are those of Reynolds, Zweig does not explain how he knows that the deficiencies he found were not problems left by stocker Kenny Kimbrell. Even worse, did Zweig know that the problems had been left by Kimbrell but Zweig seek to lay the blame on Reynolds? Zweig and Sanders did not testify with a favorable demeanor in this area, whereas Reynolds and Bland did. Finding that the discrepancies did not exist, I find that Fleming had no basis for its accusation number 5.

Discrepancy number 6. The "area check" mentioned appears at RX 3 page 45. (6:973–974, Sanders; 7:1265–1266, Zweig). The first two days (Monday and Tuesday, November 17–18) from that check are specified, plus Monday, November 24 (which repeats the accusations set forth in discrepancy number 4 already covered).

As to the charge about Monday, August 17, Reynolds denies. (3:485). The pallets on the floor had been left there by Kenny Kimbrell. (3:485). As for the white tag freight, order selectors and the late stocker (who work beyond 2:30 p.m.) frequently come into a section and pull merchandise, and sometimes they fail to key these moves into the computer. (2:276; 3:497–499). Similarly, Reynolds always throws box tops that she cuts off into the trash boxes. As the late stocker does the same work as a regular or floating stocker, he could have done that. (3:499–500, Reynolds; 4:658, Anthony). In any event, neither Leadperson Zweig nor any supervisor came to Reynolds on any of these days, or the next morning, to advise her that she was doing anything wrong. (3:500–501). Finding that Reynolds was not responsible for any alleged deficiencies, I further find that Fleming knew she was not responsible. Accordingly, I find that accusation number 6 is without merit, and I further find that Fleming knew it to be false.

(3) Discussion

Although there are several key points in the evidence, a principal one is the taint of ambush associated with this final warning. While Vessie Reynolds was working hard, such as in Kenny Kimbrell's section, Leadperson Mitch Zweig never came by and told her that she (supposedly) was doing anything wrong. For over 2 weeks in November 1997 he never said anything to her about any supposed deficiencies even though, ever since the first of these days, November 10, he admittedly had begun watching her because of assertedly having seen some problems. Why would anyone in management, or in the position of management's agent, not say anything for all these many days, and then management unload it all at a final warning session with three management representatives bravely arrayed against a lone employee? After all, Warehouse Supervisor Doug Sanders vividly describes at trial the very bad consequences that befall Fleming when, as a result of false information, merchandise gets "lost" in the computer system. (5:861). Clearly, the time to correct any bad habits is quickly.

But what of past practice? Perhaps Fleming always ambushes its employees, and therefore did not treat Reynolds disparately. To consider this point, turn to the copies of comparative discipline reports offered by Fleming in support of, and earlier discussed in conjunction with, the warning of August 25, 1997. [No additional comparative discipline was offered specifically respecting the final warning.] An inspection shows that, rather than ambush, Fleming's practice is to speak to the employee either the same day or no later than the next business day: RXs 15, 14, 29, 33, 35, 34, 32, 16, 17, 13 (in date sequence, from November 1994 to June 1997). The same holds true concerning the comparative warnings which Fleming offered respecting the February 5 warning to Reynolds and Richard Campbell: RXs 9, 10, 12, 18, 11 (a date sequence beginning April 1995 and ending November 1997). In view of this clear pattern of past practice, I find that, departing from past practice here respecting Reynolds, Fleming treated Vessie Reynolds disparately.

Fleming treated Reynolds with disparity because, I find, it wanted to lay the final groundwork for getting rid of her because of her activities on behalf of the Union. It therefore blamed Reynolds for defects for which, I find, it knew she was not responsible. Furthermore, it delayed notifying Reynolds of the accusations until the evidentiary trail was either cold or nonexistent. Thus, Fleming thereby effectively removed Reynolds' ability to defend herself by exposing the baseless nature of the accusations against her. These are the ones in accusations 1, 4, 5, and 6. I therefore find that the Government has proved, prima facie, that the final warning was tainted with unlawful motivation.

The question now is whether the evidence shows that Fleming would have issued the final warning as to discrepancies 2 and 3 even had there been no union activities. I find the answer to be yes. In August Reynolds was disciplined (GCX 11; RX 7) for problems concerning her replenishment sheets, and the face of the final warning issued here (GCX 13; RX 3) shows, in the bolded language under the heading "What The Company Expects," that the principal concern of the warning was Reynolds' problem with her replenishment sheets. Finding that Fleming would have issued the final warning simply over discrepancies 2 and 3 (the matter of the replenishment sheets), I shall dismiss complaint paragraph 17(b).

CONCLUSIONS OF LAW

Respondent Fleming Companies, Inc., Memphis General Merchandise Division (Fleming), is shown to have violated Section 8(a)(1) of the Act as alleged, but not respecting Section 8(a)(3) as alleged. The unfair labor practices affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Fleming Companies, Inc., Memphis General Merchandise Division, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting by rule (to the extent it has not rescinded the rule) solicitation of any kind on company property.

(b) Threatening employees with unspecified reprisals or other discipline for engaging in activities on behalf of a union.

(c) Informing employees that Fleming was imposing more stringent working conditions, and would now enforce rules as to time clocks, because of a union organizing campaign.

(d) Removing union literature from the bulletin boards while permitting personal items to be posted there.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its general merchandise warehouse at Memphis, Tennessee, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or ceased its operation at the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 15, 1997 (the date of the first unfair labor practice found in this case).

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found, including paragraphs 14 through 19.

Dated, Washington, D.C. September 18, 1998

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT prohibit by rule (to the extent we have not already rescinded the rule) solicitation of any kind on company property.

WE WILL NOT threaten you with unspecified reprisals or other discipline for engaging in activities on behalf of a union.

WE WILL NOT inform you that Fleming is imposing more stringent working conditions, and will now enforce rules as to time clocks, because of a union organizing campaign.

WE WILL NOT remove union literature from the bulletin boards while permitting you to post personal items there.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

FLEMING COMPANIES, INC., MEMPHIS GENERAL MERCHANDISE DIVISION

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."